(1) Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

WINIFRED N. COTTER, ET AL.,
Petitioners,

v.

THE CITY OF BOSTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the First Circuit erred in deciding that the Petitioners did not have Article III standing where in the absence of the use of race Petitioners would have been promoted under the provisions of Massachusetts Civil Service Law?

Whether the First Circuit Court of Appeals can substitute its own compelling "governmental" interests for deficient compelling governmental interests of the City of Boston where the Court's substituted compelling governmental interests are events that occurred some 16 months after the use of the race in the instant case, and where the City of Boston never used said events as justifications for the use of race in the instant case, and the Petitioners never had the opportunity to challenge said events as compelling governmental interests?

Whether the First Circuit Court of Appeals disregarded this Court's requirements under Strict Scrutiny that the Compelling Governmental Interest for the Use of race "must be clearly identified and unquestionably legitimate" when the First Circuit substituted a new standard of "plausibility", thus eliminating the need for the governmental actor to identify the multiple factors influencing its decision to use race?

Whether the First Circuit Court of Appeals disregarded this Court's requirements concerning Strict Scrutiny by allowing the governmental actor, City of Boston, to provide various "after the fact" justifications for the use of race after the litigation in the instant case commenced, where the justifications were not articulated by the City of Boston at the time that race was used against the Petitioners, and where the justifications articulated at the time race was used against the Petitioners failed to meet Strict Scrutiny?

Whether the First Circuit Court of Appeals erred in failing to apply this Court's standards under Strict Scrutiny in order to determine whether the use of race was narrowly tailored to achieve the alleged compelling governmental interest, where Commonwealth of Massachusetts law specifically prohibited the use of race in the promotion process for Civil Service jobs, and such prohibition was disregarded by the First Circuit in its decision that use of race did not violate state law?

Whether the First Circuit Court of Appeals erred in disregarding the Joint Motion for Entry of Declaratory Judgment filed by Defendant Hartnett, in this official capacity of Personnel Administrator of the Commonwealth of Massachusetts, admitting that the use of race in the promotion process violated Commonwealth of Massachusetts law because Hartnett allowed race to be used against the Petitioners?

Whether the First Circuit erred in holding that a mere disparity between the percentage of African American sergeants within the Boston Police Department (16.49%) compared to the percentage of African Americans within the entire Police Department of all ranks (25.02%) is "concrete evidence that discrimination existed at the time that the African American officers were promoted" where the disparity results directly from the implementation of the Consent Decree entered in *Castro v. Beecher*, 459 F. 2d. 725 (1972), and where the parties, including the United States District Court, allowed the Consent Decree to lapse after seventeen years of court involvement in the promotion process?

Whether the First Circuit Court of Appeals erred in allowing the City of Boston to suggest that the disparity between the

percentage of African American sergeants and African American officers was concrete evidence of discrimination, while at the same time, a different panel of the First Circuit Court of Appeals held in *Quinn, et al v. City of Boston*, 325 F. 3d 18 (1st Cir. 2003) operating under the exact same Consent Decree, that the discrepancy between African American firefighters and African American lieutenants was not evidence of discrimination at all?

PARTIES TO THE PROCEEDING

The petitioners, plaintiffs below, are Winifred N. Cotter, Vincent J. Difazio, John P. Doris, William J. Dwan, William G. Knecht, Michael, Locke, Patrick L. Murphy and Thomas L. Sexton.

The defendants below are: the City of Boston and the Intervenor Massachusetts Association of Minority Law Enforcement Officers, Dennis A. White, and Harold White.

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The opinion of the First Circuit of March 25, 2003 is attached hereto in Appendix A.

JURISDICTION

On March 25, 2003, the First Circuit Court of Appeals affirmed in part and reversed in part a decision of the District Court, dated March 21, 2002. A Petition for Rehearing En Banc was denied on May 28, 2003.

Under 28 U.S.C. § 1254, this Court has jurisdiction to review judgments of courts of appeal. "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal, before or after rendition of judgment or decree."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves portions of the Fourteenth Amendment to the Constitution of the United States:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The case also involves issues under Article III of the Constitution of the United States:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States..."

This case involves issues under 42 U.S.C. §§ 1983, 1985, 1986, 1988.

This case involves claims under Massachusetts General Laws c. 31 §§ 1, 5, which prohibits use of race in promotion processes in Civil Service jobs.

STATEMENT OF THE CASE

A Consent Decree governing the hiring and promotion of Boston Police Officers was in existence from 1978 to 1995, at which time after many extensions, said Consent Decree lapsed. Approximately two years later, the Defendant City of Boston and the former Defendant James J. Hartnett, Jr., Personnel Administrator for the Human Resources Division ("HRD") for the Commonwealth of Massachusetts allowed for the promotion of three African-American officers to the position of sergeant, where said African American officers scored 84 on the promotion exam over equally scoring and higher scoring Caucasian candidates. The sole and exclusive justification for promoting the three African American officers given by the City of Boston at the time of the promotion was "to comply with EEOC Guidelines, and federal and state law". The Petitioners, all Caucasian, also scored 84, but were not considered or promoted. The City of Boston was prevented from using race by Hartnett because the Consent Decree was no longer in effect, and state law prohibited lower scoring candidates from bypassing higher scoring candidates. Ultimately, Hartnett allowed the use of race in violation of the Commonwealth's own statute, Massachusetts General Laws c. 31 §§ 1,5 which prohibited

the use of race in the promotion process. HRD permitted the promotions provided that the City of Boston promote all candidates down to and including the score 84, but excluding all white candidates at score 84. After the Petitioners filed suit against the Personnel Administrator of the Human Resources Division of the Commonwealth of Massachusetts and the City of Boston, Hartnett, in his official capacity as Personnel Administrator represented by the Attorney General of Massachusetts, acknowledged and admitted in a Joint Motion for Declaratory Judgment that his decision to allow race to be used so as to prevent the Petitioners from being promoted violated Massachusetts state law. Said Motion and attached Stipulation and Settlement required the Commonwealth to pay $47,188.55 to the Petitioners. This left the City of Boston and the Interveners as Defendants.

During discovery, it was determined that the use of race did not meet EEOC Guidelines (as testified to by the Defendants' own expert witness), and further, that the City of Boston at the time that it referred to "complying with state and federal laws", could not identify what state or federal law they were "complying" with, or what the terms, conditions, and requirements of the said laws were. After the commencement of the litigation, the City of Boston articulated new justifications that were never listed in any of its correspondence to the Commonwealth of Massachusetts at the time of the use of race. Those justifications included diversity, "community policing," "operational needs," threat of lawsuits, and vestiges of past discrimination. The United States District Court found that the Petitioners' rights had been violated, and were likely to be violated again because of the use of race in the promotion process. However, the United States District Court found for summary judgment against the Petitioners.

The First Circuit Court of Appeals, in reversing in part and affirming in part the district court's granting of summary judgment against the Petitioners, relied on events that occurred 16 months after the use of race against the Petitioners in the promotion process, where the Petitioners never had the opportunity to challenge said events, since they were never suggested as the compelling governmental interest in the summary judgment proceeding. The First Circuit Court of Appeals further allowed the City of Boston to provide various "after the fact" justifications for the use of race against the Petitioners, where such justifications were not articulated by the City of Boston at the time that race was used against the Petitioners. The First Circuit further found that a governmental actor need not prove that all of its "after the fact" justifications meet Strict Scrutiny.

The First Circuit disregarded the Joint Motion for Declaratory Judgment in which Hartnett admitted that he had violated the Commonwealth's own statute, and further disregarded M.G.L. c. 31 §§ 1,5 which prohibits the use of race in Civil Service promotions. The First Circuit did not state its authority to disregard Hartnett's admission that he violated the Commonwealth's own statute.

The First Circuit based its decision on "narrow tailoring" under Strict Scrutiny on the fact that there was no state law preventing the use of race in the promotion process, notwithstanding the clear language of M.G.L. c. 31 §§ 1,5 preventing the use of race requires a finding, by definition, given the language of M.G.L. c. 31, that the use of race was not narrowly tailored to achieve any of the either stated justifications, or the after the fact justifications. The First Circuit also held that the mere disparity between the percentage of African American sergeants and African American police officers was "concrete evidence" of

discrimination, even though the First Circuit never acknowledged that the existing disparities in percentages between the African American sergeants and the African American police officers were as a result of the very Consent Decree that had lapsed in 1995. To the extent that the disparity exists, it is as designed by the Consent Decree which the District Court, and ultimately the Court of Appeals, had approved.

Four days after the First Circuit Court of Appeals in the instant case, it decided the case of *Quinn et al v. City of Boston*, 325 F. 3d. 18 (1st Cir. 2003) in which the Court examined the differential between minority Boston firefighters and minority Boston Fire lieutenants, under the same Consent Decree that had applied to the police in the instant case, but that continued to apply to the Boston Fire Department. A different panel of the First Circuit held that the percentage difference between minority firefighters and minority lieutenants was not evidence of discrimination at all. Thus, the determination of concrete evidence of discrimination is dependent upon, not First Circuit law, but on the luck of the draw of the First Circuit panels.

A. FACTS BELOW

In 1978, Massachusetts Association of Afro-American Police (MAAAP), Intervenor MAMLEO's predecessor in interest, sued the Boston Police Department ("BPD") in district court for racial discrimination in promotion practice. In 1978, black officers made up 5.5% of the BPD as a whole yet there was only one black sergeant among 222 sergeants. *Boston Police Superior Officer's Federation v. City of Boston*, 147 F.3d 13, 15 (1st Cir. 1998). In 1980, the parties in *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Department* settled, and the district court entered a

Consent Decree, which included the Boston Police Department, Department of Personnel Administration, and MAMLEO's predecessor in interest, MAAAP. *Id.* The decree "set specific goals and timetables for promotions of black officers to sergeant. . . [and] These goals were to be met by the time of the decree's original expiration date of 1985." *Id.* The parties found difficulty in implementing this decree, and by the 1985 date, the Boston Police Department had not met the decree's goals. MAAAP succeeded in having the district court extend the duration of the decree until 1990. However, by 1990, the Boston Police Department had still not yet the met the goals, and BPD as Defendants to that litigation and MAAAP both requested that the decree be extended again until another validated exam could be given in 1991. Pursuant to each party's duties, MAMLEO challenged the exam, and the parties proceeded to amend the decree again as to the promotion of sergeants. *Id.* at 16.

In 1995, the parties, the district court included, allowed the consent decree to lapse by its own terms.

On October 19, 1996, an examination ("Exam") was given to Boston police officers for the purpose of determining who would be promoted to the rank of sergeant in the BPD. All of the Petitioners took the Exam.

A list of 69 candidates eligible for promotion to the rank of sergeant was generated by HRD based solely upon the 69 highest scores on the certification list. The BPD, in conjunction with the HRD, promoted officers to the rank of sergeant from that list. The highest score was 92 and the lowest score was 82. Candidates are arranged in alphabetical order in each score (thus all candidates with a score of 84 were listed in alphabetical order after all candidates who had a score of 85). In the score group of 84, 3 were African

American (the "3 African American Officers"), and 10 were Caucasian officers, 7 of whom are the Petitioners.

The BPD informed HRD that the BPD had selected the 3 African American Officers for promotion to the position of sergeant, notwithstanding the fact that they had a worse certification score than other, Caucasian, officers and exactly the same score as the Petitioners. The BPD also promoted 27 other candidates.

The BPD's sole and exclusive justification for promoting the three African American officers, at the time of the promotion, was "to comply with EEOC Guidelines and state and federal law."

The BPD stated in a letter to HRD that the selection rationale of the 3 African American Officers was based on statistical analysis conducted by the BPD which indicated that in order to avoid an "adverse impact" at least three African American officers had to be promoted. The adverse impact referred to by the BPD can only be a reference to the decrease in the percentage of sergeants below 16.17%. Thus, the BPD intended to maintain the percentage of African American sergeants at 16.17%. The failure to promote the 3 African American Officers would result in a failure to maintain the racial percentage of African American sergeants at 16.17%. Therefore, 16.17% was a quota established by the Defendants. This quota was not established as an official quota or affirmative action policy by the BPD or HRD nor was it the result of a court order.

HRD informed the BPD that the BPD's justification for the use of race was unacceptable under the provisions of Mass. Civil Service law, M.G.L. c. 31. HRD did allow the BPD to promote all candidates down to score 84, including

the three African American officers, but excluding the Caucasian candidates who also scored 84. Had the non-minority candidates with a score of 84 been promoted, the number of promotions would have been 46. Because the non-minority candidates at score 84 were excluded because of race, the class was 36. Based upon HRD's rejection of the BPD's justification for promoting the 3 African American officers, the BPD wrote a letter to the Personnel Administrator of the Commonwealth of Massachusetts on June 8, 1998. The BPD specifically states:

> "In order to maintain the promotional status of the three African American officers, [the Commissioner] filed a Public Safety Civil Service Requisition for six sergeant vacancies on May 5, 1998. [The] intent was to promote the six Caucasian officers who had been initially bypassed in order to promote the three African American candidates who had scored lower on the promotional examination." (emphasis added)

This "admitted" racial goal was intended to and did exclude Petitioners for promotions because only the 3 African American Officers with a score of 84 were preselected. None of the Caucasian officers with a score of 84 were preselected or even considered. M.G.L. c. 31 §§ 1,5 specifically prohibit the use of race in promotions for Civil Service jobs. Thus, HRD violated M.G.L. c. 31 §§ 1,5.

HRD's decision would not have violated M.G.L. c. 31 §§ 1,5 if all candidates who scored 84 were promoted. If race were not considered in compliance with c. 31 §§ 1,5 then all candidates with the score of 84 would have been promoted. The Petitioners were denied the promotions solely because they are Caucasian.

The Petitioners, on May 22, 1999, filed a suit against the City of Boston and James J. Hartnett, Jr., in his official capacity as the Personnel Administrator of the Commonwealth of Massachusetts, alleging that the City of Boston and Hartnett violated the Petitioners' rights under 42 U.S.C. § 1983 by failing to promote the Petitioners to sergeant because of their race (Harnett, as the Personnel Administrator for the Commonwealth of Massachusetts, was responsible for oversight of the Civil Service promotion process).

After the filing of the Petitioners' Complaint, and Motion to Intervene was filed by the Massachusetts Association of Minority Law Enforcement Officers, as well as two of the three African American officers who were promoted with a score of 84. The Motion to Intervene anticipated that the Interveners would act as co-Defendants, and they sought to enlarge the issues of the case by challenging the validity of the promotional exam, even though the African Americans had been promoted and the Petitioners were not challenging the exam, but only the use of race against the Petitioners. The District Court denied the intervention. However, the First Circuit Court of Appeals reversed the District Court and allowed the intervention based upon the Intevenor's suggestion that the Intervenor might challenge the fairness of the exam. *Cotter v. Mass. Association of Minority Law Enforcement Officers*, 219 F. 3d. 31 (1st Cir. 2000).The Petitioners filed a Petition for Writ of Certiorari seeking to overturn the First Circuit's decision to allow the intervention based upon Article III issues as well as the complexities that would result from the expansion of issues beyond what the Petitioners had claimed in the Complaint. Certiorari was denied.

After discovery proceeded and prior to summary judgment, the Petitioners and Defendant James J. Hartnett,

Jr., in his official capacity as Personnel Administrator for the Commonwealth of Massachusetts, acting through his successor and assign, Acting Personnel Administrator Patricia S. Wada, filed a Joint Motion for Entry of an Order for Declaratory Judgment and Supporting Documents, and stipulated specifically that the Commonwealth violated Massachusetts General Laws c. 31 §§ 1,5 by allowing race to be used in the promotion process, and such violation resulted in the Commonwealth failing to comport with the requirements of the statute under § 1 because basic merit principles were not applied to the promotion process. In addition, the Commonwealth of Massachusetts paid attorney's fees for the Petitioners in the amount of $47,188.55. The Order for payment of attorney's fees was entered by the United States District Court.

On summary judgment, the District Court, despite the seventeen-year presence of the Consent Decree which had lapsed only two years earlier, found that "past discrimination" was a justification for the use of race against the Petitioners. No example of past discrimination was identified by the district court or the First Circuit. However, the District Court also found that the Petitioners "face the kind of real and immediate threat of injury that anti-discrimination law is designed to redress." Opinion p.96a. The district court affirmed that the Petitioners had standing and were injured because they "obtain[ed] a score on a promotion exam identical to candidates of other races, and yet, [were] denied promotion while candidates of other races [were] promoted." *Id.* The district court further stated that this injury that the Petitioners sustained is likely to occur again, as it is likely that the Petitioners will take future promotional exams and again "participate in a competition in which they are not on an equal footing with candidates of other races." Opinion p.96a.

Despite the above findings, confirming the violation of Petitioners' rights by the City of Boston, and despite the district court's language granting Petitioners the right to "pursue equitable as well as legal relief", *id.*, the district court found Summary Judgment against the Petitioners.

On appeal to the First Circuit Court of Appeals, a three-judge panel, including Chief Judge Boudin, Senior Circuit Judge Farris of the Ninth Circuit Court of Appeals sitting by designation, and Circuit Judge Torruella affirmed in part and reversed in part (that portion which was reversed is not part of this Petition).

REASONS FOR GRANTING THE PETITION

I. THE PETITIONERS HAVE ARTICLE III STANDING TO OBTAIN DAMAGES

The First Circuit inappropriately states that the Petitioners lack Article III standing, relying on this Court's decision in *Texas v. Lesage*, 528 US 18 (1999). In order to achieve its result, the First Circuit looks to the class of 30, and held that Petitioners would not have been promoted if only 30 candidates were promoted. However, the class size of 30 which was relied on by the First Circuit was an "illegal" class based upon violating M.G.L. c. 31 § 27, because, as HRD pointed out, higher scoring white candidates were being bypassed in violation of M.G.L. c. 31 § 27. HRD, therefore, prevented the City from violating § 27. Given the stated intention of BPD to promote the three African American officers under all circumstances, the class of 30 would never have been "legal." The class size of 36 is also illegal because it also violated state law under M.G.L. c. 31 §§ 1,5, as admitted to by the State Defendant. Therefore, the class size of 36 cannot be the basis of analysis for the purpose of Article

III standing. As the district court pointed out in its decision to deny a Motion to Dismiss, Hartnett and HRD were required to

> "evaluate the qualifications of applicants for Civil Service positions in accordance with *basic merit principles* and...to administer, enforce, and comply with Civil Service law and rules. *MacHenry* 40 Mass. App. Ct. 632, 635 (1999). Among other things, the term 'basic merit principles' means (i) 'advancing...employees on the basis of their relative ability, knowledge, and skills...' (ii) 'assuring fair treatment of all applicants and employees in all aspects personnel administration without regard to...race [or] color...' and (iii) 'assuring that all employees are...protected from arbitrary and capricious action.'"

See Denial of Motion to Dismiss, p. 9. (In addition, basic merit principles also require that their constitutional rights as citizens be protected). Given all of the protections afforded under c. 31, HRD and the Boston Police Department could have elected to identify the three African Americans at score 84 and promote them and remained in compliance with M.G.L. c. 31 §§ 1,5, provided that they did not use race against any other individual of equal to or higher score. This then, would have required a class size of 46 (this includes all 13 individuals, African-American and Caucasian, with the score of 84) since the intention was to absolutely promote the three African Americans. Indeed, the City of Boston freely admitted that the purpose of increasing the class size was "in order to maintain the promotional status of the three African American officers." As a result, the First Circuit's reliance on a class size of 30 or 36 is inappropriate. Under Massachusetts law, given the decision to absolutely promote the three African Americans, then the class size would have to be 46,

and in the absence of the use of race in the class of 46, the Petitioners absolutely would have been promoted. The use of race by the City of Boston excluded the Petitioners. Fundamentally, the admission and stipulation by Hartnett on behalf of HRD verifies this fact. Therefore, given the City's intention to promote the three African Americans, only the use of race excluded the Petitioners.

While this section deals with Article III standing, this Court must remain "most skeptical" of the urging of the BPD and the First Circuit in connection with the reliance on the class size of 30 or 36. *See Bush v. Vera*, 116 S. Ct. 1941, 1951-56 (1996). This is because these class sizes are being proffered for "racial justification" reasons in order to avoid liability in this case. The City of Boston, the original defendant in the Consent Decree case, fought long and hard against the plaintiffs in that case against the establishment of any "past discrimination." Now, since the political landscape has changed, the City of Boston is arguing that its own discrimination against minorities in the past justifies its use of race in the instant case. This should surely raise skepticism. Obviously, the Commonwealth believed that the City of Boston attempted implementation of the Consent Decree, even though it had lapsed when it promoted the three African Americans in the instant case. As the First Circuit pointed out, the Commonwealth informed the City that it could not justify the use of race because the Consent Decree had lapsed. Reliance on the class size of 30 or 36 is fundamentally inappropriate because the City's objective was never a specific number of promoted sergeants. Its objective was the promotion of the three African Americans officers, and it took whatever steps were necessary to achieve that goal. The City of Boston cannot have a goal of promoting the three African Americans at any cost, and then, when confronted with this case, use one of its rejected racial schemes to establish class

size. Under Massachusetts law, the class size would have to be 46. Indeed, the Defendants' expert testified that they examined a class size of 46. The establishment of the class size is race related, intended to defeat standing. All of this was explained in detail in separate memoranda filed with the United States District Court prior to its decision on summary judgment.

Even if M.G.L. c. 31 did not exist and the class size was 30, which it was not, the First Circuit's decision relies on the illogical *result-oriented* analysis of the very sort rejected by the 11th Circuit in *Wooden v. Board of Regents of the University System of Georgia,* 247 F. 3d. 1262 (11th Cir. 2001), suggesting that if race were not used which of course it was, then the Petitioners would not have standing because they would not have been promoted. This in effect is the denial of Article III standing based upon a hypothetical. It is axiomatic that Article III standing cannot be established by hypotheticals, nor can it be denied by hypotheticals. However, this Court's decision in *Lesage* seems to suggest that a hypothetical can result in the loss of Article III standing for damage purposes. The Eleventh Circuit considered *Lesage* in making its decision in *Wooden*. The Eleventh Circuit determined that the standard should not be whether the Appellant in that case should have received an acceptance in the absence of the use of a race-based policy. Rather, the question was whether the Appellant could have been eliminated in some race neutral first step in the admissions process that existed at the time. The First Circuit, relying on *Lesage*, pretends that there is a different process for promotion, i.e, the hypothetical process where race was not used in the illegal class of 30. The 11th Circuit in *Wooden* emphasized that the only justification for the elimination of Davis in Lesage was the application of a race-neutral step in the then existing admissions process. Under the *Wooden*

standard, a review of the instant case based upon the Massachusetts state law mandating a class of 46, it can be easily determined that there was no race-neutral criteria that eliminated the Petitioners' promotion. Certainly, the Petitioners did not score too low, since they scored 84, as did the three African Americans. The First Circuit's reliance on the class of 30 demonstrates a fundamental flaw in its logic. *Lesage* assumes that if the use of race is otherwise "unconstitutional," the plaintiff would have to show that he would have been accepted in the absence of such unconstitutional behavior. In the instant case, M.G.L. c. 31 allows for the identification and promotion of the three African Americans, provided that race is not a consideration in the granting or withholding of promotion of any Caucasian who score equal to or higher than the three African American officers. Any proposed hypothetical promotional procedure, such as the one being suggested by the First Circuit, could never resolve the problem of how this Court could ensure that Petitioners and those minorities promoted as a result of the use of race could possibly be on "equal footing," since any proposed alternative process does not alter the fact that the minorities were promoted solely because of race.

In *Northeastern Florida Chapter Association of General Contractors v. City of Jacksonville*, 508 US 656 this Court rejected the flawed, result-oriented argument, emphasizing that it was immaterial for standing purposes, because:

> The "injury in fact" in an equal protection case of this variety is the denial or equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Jacksonville, 508 U.S. at 666 (*See Turner,* 396 U.S. at 362). The *Wooden* court reinforced the Supreme Court's censure of

such counterfactual hypothetical defenses, by reinforcing this Court's holding in *Jacksonville*. To ensure that there was no confusion, the *Wooden* court reiterated this Court's holding from *Adarand,* and *Jacksonville*:

> When a plaintiff competing for a government-sponsored benefit has been treated differently because of race, he has standing to challenge that differential treatment because his application has not been considered 'on equal footing' with applications from members of the favored racial group. . . focusing on the injury caused by direct *exposure* to unequal treatment, without regard to whether the plaintiff ultimately may obtain the sought-after benefit.

Wooden, 247 F.3d at 1276.

II. THE FIRST CIRCUIT'S CONFUSES ARTICLE III STANDING AND NARROW TAILORING

As evidence of the confusion of the First Circuit concerning Article III standing, this Court need only look at the discussion of the First Circuit concerning narrow tailoring. In that discussion, the First Circuit considered several factors to determine if the use of race is narrowly tailored. These factors include, (1) the extent that the beneficiaries of the use of race are specifically advantaged; (2) the extent to which the legitimate expectancies of others are frustrated or encumbered; (3) the extent to which the use of race interferes with other valid state or local policies, and; (4) the extent to which the use of race contains a built-in mechanism which will, if time and events warrant, shrink the scope and limit of the use of race's duration. *See Opinion* p. 22a. In fact, the second of these four factors for determining narrow tailoring, is in effect, an Article III standing

determination. While the First Circuit on one hand states that it need not resolve the issue of whether the Petitioners have Article III standing, it nevertheless states in determining the narrow tailoring - that the African Americans were not "specifically or unfairly advantaged by their promotions...all officers were competing for a limited number of spots. Because of this competition, the City's promotion of the African American officers did not disturb any legitimate, firmly rooted expectations of the Appellants...had the City not departed from strict rank order, no additional Caucasian officers would have been hired [sic]." *Id.* at 23a (emphasis added).

The above statement by the First Circuit, in effect, is a denial of Article III standing. However, it is undisputed that the only reason that the three African Americans were promoted over the Petitioners was solely and exclusively their race. There was absolutely no evidence that the three African American officers were more qualified or qualified differently from the Petitioners. In this regard, therefore, the Petitioners have every expectation that race not be used against them. Nor can it be denied that the three African American officers were advantaged solely because of their race. Thus, in trying to evidence narrow tailoring, the First Circuit attempts to demonstrate the lack of Article III standing, but the attempt clearly proves the exact opposite.

If that were not enough, the First Circuit inexplicably states, "No valid policies have been disturbed by hiring [sic] three African American sergeants. While Massachusetts law requires an explanation for promotions made outside of strict rank order, there is no prohibition on such out of rank decisions. See Mass. Gen. Laws c. 31 § 27."

In order to bolster its decision that Petitioners have no expectation that race won't be used against them, the First Circuit disregards the basis of Hartnett's Joint Motion for Entry of Declaratory Judgment and Stipulation admitting that he had violated M.G.L. c. 31 §§ 1,5 which specifically prohibits the use of race in any hiring or promotional procedure. It is important to note that the First Circuit unfairly stylizes its description of the Joint Motion for Entry of Declaratory Judgment against Hartnett in his official capacity as Personnel Administrator for the Commonwealth. The only reference to the Joint Motion is in footnote No. 3 of the Opinion, in which the First Circuit describes the Joint Motion as a "settlement," and that Hartnett was "dropped" from the suit. In actuality, the Petitioners required Hartnett to agree to the Entry of Declaratory Judgment against him for the express purpose of establishing certain stipulations and law contained in the Joint Motion and supporting documents, which demonstrate, in effect, that because Hartnett admitted that the law had been broken, Petitioners would be able to prove that the class size had to be 46. The First Circuit's description of the Joint Motion as a "settlement" is additionally inappropriate because the district court at the urging of the City of Boston and the Interveners, who were adamantly opposed to Hartnett's Joint Motion, refused to enter the Declaratory Judgment against Hartnett, but did enter the awarding of $47,188.55 in attorney's fees. As a result, Hartnett was never "dropped" from the litigation. The First Circuit's description of the so-called "settlement" serves the distinct purpose of avoiding the otherwise unavoidable stipulations contained in the Joint Motion. Those stipulations unequivocally admit that Massachusetts law was not complied with. Because of this, summary judgment should never have been granted against the Petitioners.

Hartnett, represented by the Commonwealth of Massachusetts Attorney General's office, willingly acknowledged that its failure to enforce the provisions of c. 31 §§ 1,5 resulted in damages to the Petitioners and, as a result, the Commonwealth paid $47,180.55 in attorney's fees for the Petitioners. For whatever reason, the First Circuit has elected to disregard that Joint Motion, and to disregard the existence of c. 31 §§ 1,5 in its entirety. In this case, the First Circuit has not made any determination that M.G.L. c. 31 §§ 1,5 is somehow unconstitutional, nor could it, since it is consistent with the Fourteenth Amendment of the United States Constitution. Specifically, c. 31 "requires that the Personnel Administrator evaluate the qualifications of applicants for Civil Service positions in accordance with basic merit principles..." As the Joint Motion from the Hartnett states,

> "Among other things, the term 'basic merit principles means (i) advancing...employees on the basis of their relative ability, knowledge, and skills...; (ii) 'assuring fair treatment of all applicants and employees in ll aspects of personnel administration without regard to...race [or] color...'; and (iii) assuring that all employees are...protected from arbitrary and capricious action. M.G.L. c. 31 § 1...nonetheless knowing of the Boston Police Department's intent to promote the Three Black Officers solely on the basis of their race and scores, HRD (the Commonwealth) should have required the Boston Police to adequately justify the eventual promotion of the Three Black Officers to the exclusion of the equally scoring Plaintiffs, and by not doing so, HRD did not comport with basic merit principles."

The First Circuit simply disregards the existence of the State law prohibiting the use of race. It does so in order to bolster its already fractured reasoning that the Petitioners have no Article III standing because they have no reasonable expectation that race will be not be used against them. In any event, if the First Circuit is confused about the issues related to Article III standing in this regard, it is unmistakably clear that the use of its justifications for narrow tailoring must necessarily fail, since the First Circuit most certainly was aware that there was a valid public policy under state law which prohibited the use of race, and the State has admitted its liability in this regard. For this reason alone, this Court should grant Certiorari.

III. THE FIRST CIRCUIT CANNOT CIRCUMVENT THIS COURT'S REQUIREMENTS UNDER STRICT SCRUTINY BY SUBSTITUTING ITS OWN (AFTER THE FACT) AND RETROACTIVELY APPLIED JUSTIFICATIONS FOR COMPELLING GOVERNMENTAL INTERESTS

This Court requires that Strict Scrutiny be applied to any governmental actor's use of racial classifications. *See Adarand v. Pena*, 515 U.S. 200 (1995). Strict scrutiny in turn requires a compelling governmental interest and narrow tailoring towards that interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 507-508 (1989). This Court has also stated that courts must be the "most skeptical" of the use of race by any governmental actor. *See Bush v. Vera*, 116 S.Ct. 1941, 1951-56 (1996). Racial classifications are simply too pernicious to permit anything but the "most exact connection between the justification and the classification". *Adarand*, 515 U.S. at 213, quoting Stevens, J. dissenting in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (emphasis supplied).

The stated justification at the time of the use of race against the Petitioners was contained in a December 26, 1997 letter from the Director of Human Resources for the Boston Police Department to the Assistant Director of the Human Resources Division of the Commonwealth of Massachusetts. That justification was "to ensure compliance with current EEOC Guidelines and applicable federal and state discrimination laws." No other justifications were ever provided prior to the filing of the litigation. After the litigation was filed, the City of Boston raised ex post facto defenses, including "community policing," the threat of litigation, "operational needs," "diversity of the police force," and past discrimination. At no time was there any suggestion by the City of Boston that events that would take place seventeen months after the use of race against the Petitioners would be used as a justification for said use of race. During discovery, the City testified that it was unaware of any federal or state law which actually required the use of race. The City also testified that it was unaware of any discrimination against minorities by the Department, since the Consent Decree lapsed. It was unaware of any claims by the three African Americans who were promoted. It was unaware of any threats of litigation in connection with the exam in question. Thus the only remaining possible justification would have to be limited to EEOC Guidelines. However, the Defendants' own expert, Lundquist, testified at the Daubert Hearing that even with the use of race in the instant case the City of Boston did not achieve EEOC Guidelines at all. So the use of race could not have ensured compliance with EEOC Guidelines. Thus, the "clearly identified and unquestionably legitimate goal", to the extent that adverse impact is such a goal, was admittedly not met, and therefore not narrowly tailored. Rather than discussing this failure, the First Circuit chose to disregard it. Without "compliance with EEOC Guidelines," and without identified

"state and federal law," the stated justifications could never be "clearly identified and unquestionably legitimate," as this Court requires. With the "legitimacy" of the proffered justification in shambles, the First Circuit, on its own, relied on an event which occurred seventeen months after the use of race against the Petitioners, in which a Police Department employee hung a noose over an African American officer's motorcycle. The First Circuit stated,

> "Commissioner Evans, who made the decision to promote the African American officers, was aware of racial tensions within the Department. Officers had complained to him about disparate treatment, including racially based punishment and job assignment. Officers also complained to him that they were racially targeted following an incident where a noose was placed on an officer's motorcycle."

See Opinion, First Circuit Court of Appeals, p. 21a.

This is the "noose" incident, which in reality took place over a year after the use of race in the instant case. This fact was pointed out to the First Circuit by the Petitioners in the Petition for Rehearing En Banc, in which it was suggested that if it were a factual mistake, it should be corrected. In the alternative, Petitioners pointed out that if a retroactive justification were being applied by the First Circuit, such a justification was unconstitutional. The First Circuit refused to change its ruling. The First Circuit's substituted compelling governmental interests of "racial tensions" is not "clearly identified or unquestionably legitimate," since it is not the governmental actor making that determination at the time race was used. It is a decision of a court substituting its compelling governmental interest 17 months after the fact. Nor is there any suggestion that the promotion of the three African

American officers over the Petitioners was narrowly tailored to eliminate the First Circuit's compelling governmental interest of "racial tensions." In any event, the decision to rely on after the fact justifications of the "noose incident" is equally defective, since that incident had nothing to do with rectifying governmental action against African Americans. The reference in the above quote to minorities complaining of disparate treatment resulted from a study undertaken by the Department and released approximately in January of 2001, over three years after the use of race against the Petitioners.

This Court has rejected the idea of governments providing retroactive justification for the use of race. Given the fact that the First Circuit is supplying a retroactive justification, it must certainly violate Strict Scrutiny. In *Shaw v. Hunt*, 116 S.Ct. 894 (1996)(Shaw II) the Appellees attempted to prove that their use of race could be justified based on two reports prepared for the litigation challenging the use of race. This Court found that the reports were not in existence at the time that racial classification was used and as such could not have been the basis of justifying the use of race retroactively. *See Shaw v. Hunt,* 116 S.Ct. 894, 1903 (1996).

This Court's *Shaw II* decision on the prohibition against retroactivity is strengthened when viewed in conjunction with *Adarand* when this Court held that there must be the "most exact connection between the justification and the classification." *Adarand*, 515 U.S. at 213, quoting Stevens, J. dissenting in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). This holding must presume, based upon the "most exact connection" standard, that the governmental actors identified and fully understood why the classification was made at the time it was made. Any retroactive analysis by a court to supply the governmental actor with a retroactive justification for the classification, by definition, would not be the "most

exact connection." This exact connection is a mandatory requirement in order for the governmental actor (not the court) to achieve the second prong of Strict Scrutiny, i.e. narrow tailoring. The need to retroactively identify an interest means that narrow tailoring could never have been achieved, since it would be impossible for the governmental actor to narrowly tailor a use of race to achieve a goal of the court and never proffered by the governmental actor, resulting from an event which had not yet occurred at the time that race was used against the Petitioners.

IV. MULTIPLE "AFTER THE FACT" COMPELLING GOVERNMENTAL INTERESTS, WHERE ONE OR MORE OF SAID INTERESTS FAILS, MUST RESULT IN THE FAILURE OF ALL PROFFERED INTERESTS

The City proffered multiple justifications for the use of race. By proffering these so-called compelling governmental interests, the City has put itself in a constitutionally indefensible position. This is because the compelling governmental interest must be "clearly identified and unquestionably legitimate" and because there must be "the most exact connection between the justification and the classification." The First Circuit stated, while acknowledging each proffered reason must satisfy Strict Scrutiny, "Whether each proffered reason satisfies Strict Scrutiny is a question of law or a question of how the law applies to the facts..." *See First Circuit Opinion* p. 16a. Having said that, the First Circuit then relies on a "plausibility" argument as to whether or not there is <u>any need to identify</u> the justification for the classification by race. Thus, the First Circuit simply disregards the failure of the City of Boston to identify the various justifications at the time that race was used. "It is <u>plausible</u> that the Department did not feel the need to identify

[to the Commonwealth of Massachusetts] the multiple factors influencing its decision [to use race against the Petitioners]. If any of the justifications is a compelling state interest, and the City's actions were narrowly tailored to that end, the City's actions are constitutional." *See First Circuit Opinion* pp. 16-17a.(emphasis supplied). "Plausibility" is not the "most exact connection." Plausibility is most certainly not "clearly defined." Indeed, the decision of the First Circuit to rely on "plausibility" requires that the court is disregarding its obligation to be "most skeptical" in review of such justifications, and that each justification be clearly identified and unquestionably legitimate. The First Circuit, in effect, is agreeing that the governmental actor need not feel the need to identify its compelling governmental interests at the time it uses race. The "plausibility" standard has no place within the Strict Scrutiny paradigm. This Court has determined the critical importance of clearly identified justification. The fact that the City of Boston "did not feel the need" to comply with Strict Scrutiny is dispositive. The First Circuit then, without cite to any case, dismisses the argument that a failure of one or more multiple justifications would by definition mean that there is something less than the most exact connection between the classification and the justification.

The constitutional problems caused by "after the fact" justifications are exactly the same as those caused by post-enactment evidence. This problem was analyzed extensively by the United States District Court in *West Tennessee Chap. of Assoc. Builders and Contractors, Inc. v. Bd. Of Educ. Of Memphis City Schools*, 64 F.Supp.2d 714, which said:

> "With all due respect to these various circuit courts that have addressed this issue, the court concludes that admitting post-enactment evidence to show a compelling interest is contrary to Supreme Court

precedent, as developed in Wygant, Croson and Shaw. The court holds, therefore, that post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling...Because motive is an issue, it also makes sense to require that the governmental entity establish a strong basis in evidence before acting, rather than allowing a lesser standard...where a governmental entity establishes a strong basis in evidence of the need for remedial action prior to enacting a racially-based program, the court can fairly infer that the actual purpose of the program is remedial. On the other hand, if a governmental body implements a racial preference plan with little or no evidence of the need for such a program, the court can only speculate on the government's motive. Such speculation is insufficient to survive strict scrutiny analysis. *See Shaw*, 517 U.S. at 908 n. 4, 116 S.Ct. 894...Additionally, allowing the use of post-enactment evidence may encourage a government with strong racial political motivations to enact race-based preferences without an adequate factual basis. If sued, the government can then marshal its resources and use the subpoena power of the courts to support its program. This prospect may create a chilling-effect that discourage non-minorities for protecting their rights. A non-minority contractor, for instance, might feel that its equal protection rights have been violated by an affirmative action plan adopted without proper evidence of its need. However, the contractor may hesitate to sue, knowing that if it does, the public defendant will conduct extensive additional research through the legal process in an attempt to support the plan. In essence, the plaintiff would be forced to attack a moving target

> of newly developing evidence to support past motivations, rather than to deal with the motivating factors that existed at the time of the government's action.

Western Tennessee, 64 F.Supp.2d 714,719-720

V. EVEN IF THIS COURT WERE TO ALLOW "AFTER THE FACT" JUSTIFICATIONS, THE UNDISPUTED EVIDENCE CLEARLY SHOWS THAT SUCH JUSTIFICATIONS WERE NEVER CLEARLY IDENTIFIED AND UNQUESTIONABLY LEGITIMATE

In his Deposition, Boston Police Commissioner Evans was asked whether "diversity," a stated defense, was a goal for using race. He answered that he "probably" believed that, but the major reason was the adverse impact. He describes adverse impact as the major reason four times. This testimony proves that the Commissioner had not clearly identified an unquestionably legitimate goal before promoting the three African American officers, as he states that he "probably" or "may have" believed in a "secondary" issue of diversity.

Various proffered "after the fact" compelling governmental interests cannot be argued by the City "in the alternative" since each "interest" would have to be based upon difficult and different factual considerations and justifications used in the process of narrow tailoring the use of race. For example, if "ensuring compliance" with EEOC Guidelines was "the" reason, then the City would have to show that the use of race against the Petitioners was narrowly tailored to achieve that goal. It was not because EEOC Guidelines were not met. In addition, what percentage of the

total justification did compliance with EEOC Guidelines actually represent? If the Court is to be at its most skeptical, then it must require this to be answered in order to discourage what has occurred in this case, i.e., the wholesale substitution of every conceivable justification in hope that the Court will "buy" one. If compliance with state and federal law was the compelling governmental interest, then the City would have to show how the exclusion of the Petitioners achieved compliance with such laws. However, the City never identified any state or federal law in the first place, so how can the governmental actor narrowly tailor to some unknown law? The same questions must be asked about each of the "after the fact" justifications. Since each justification, added together, would have to represent 100% of the justification, then failure of one would mean that the "most exact connection" was not possible. This is as it should be in order to ensure that the governmental actor meets the difficult standard of Strict Scrutiny. To allow the "smorgasbord" of "after the fact" justifications without adherence to the "most exact connection," renders Strict Scrutiny a nullity. Moreover, 100% of the so-called expert testimony proffered by the City of Boston failed every conceivable standing set out by this Court in *Daubert*. Thus, narrow tailoring for these multiple justifications would have to have miraculously been exactly the same. It is impossible that the exclusion of the Petitioners or the promotion of the three African American officers would have achieved these goals.

CONCLUSION

The First Circuit's decision raises important deviations from this Court's holdings on Article III standing and the requirements of Strict Scrutiny. It also represents confusion on the part of the First Circuit as to what are acceptable "compelling governmental interests" and narrow tailoring.

The Petitioners respectfully request that Certiorari be granted in order to determine if this case should be reversed and/or remanded.

Respectfully submitted,

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Attorney for Petitioners
Winifred N. Cotter, Vincent J. Difazio, John P. Doris, William J. Dwan, William G. Knecht, Patrick L. Murphy, and Thomas L. Sexton.

Date: June 19, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Entered May 28, 2003]

WINIFRED N. COTTER, ET AL., Plaintiffs, Appellants,	)	
v.	)	No. 02-1404
CITY OF BOSTON, ET AL., Defendants, Appellees.	)	
WINIFRED N. COTTER, ET AL., Plaintiffs, Appellees,	)	
v.	)	No. 02-1458
CITY OF BOSTON, ET AL., Defendants, Appellant.	)	
WINIFRED N. COTTER, ET AL., Plaintiffs, Appellees,	)	
v.	)	No. 02-1459
DENNIS A. WHITE, ET AL., Defendants, Appellants.	)	

JUDGES: Before Chief Judge Boudiin, Senior Judge Farris, Judge Torruella, Judge Selya, Judge Lynch, Judge Lipez, Judge Howard.

ORDER OF COURT

Upon consideration of appellant's petition for rehearing En Banc,

It is hereby ordered that said petition be denied, as untimely.

By the Court:

/s/ _____
Richard Cushing Donovan, Clerk

[cc: Ms. Cohen, Jones, Rutkowski, Messrs. McLaughlin, Albano, Fitzpatrick, Glass, Hoch]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 02-1404, 02-1458, 02-1459

[Entered March 25, 2003]

WINIFRED COTTER, ET AL.,	)
Appellants/Cross-Appellees,	)
	)
v.	)
	)
THE CITY OF BOSTON; DENNIS A. WHITE;	)
HAROLD WHITE; MASSACHUSETTS	)
ASSOCIATION OF MINORITY LAW	)
ENFORCEMENT OFFICERS,	)
Appellees/Cross-Appellants,	)
	)
COMMONWEALTH OF MASSACHUSETTS,	)
Executive Office for Administration and	)
Finance Human Resources Division, et al.,	)
Defendants.	)
	)

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's decision that the City's actions did not violate the appellants' constitutional rights is affirmed. The district court's retention of jurisdiction is reversed.

By The Court:

/s/ _____
Richard Cushing Donovan, Clerk

Certified and Issued
as mandate under
Fed. R. App. P. 41
/s/ _____
Richard Cushing Donovan, Clerk
/s/ _____
Deputy Clerk

[cc: Mr. McLaughlin, Mr. FitzPatrick and
Ms. Rutkowski.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 02-1404, 02-1458, 02-1459

[Entered March 25, 2003]

WINIFRED COTTER, ET AL.,	)
Appellants/Cross-Appellees,	)
	)
v.	)
	)
THE CITY OF BOSTON; DENNIS A. WHITE;	)
HAROLD WHITE; MASSACHUSETTS	)
ASSOCIATION OF MINORITY LAW	)
ENFORCEMENT OFFICERS,	)
Appellees/Cross-Appellants,	)
	)
COMMONWEALTH OF MASSACHUSETTS,	)
Executive Office for Administration and	)
Finance Human Resources Division, et al.,	)
Defendants.	)
	)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
Hon. William G. Young, U.S. District Judge

JUDGES:
Before Boudin, Chief Judge, Farris,* Senior Circuit Judge, and Torruella, Circuit Judge.

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* Of the Ninth Circuit, sitting by designation.

OPINION

TORRUELLA, Circuit Judge. Plaintiffs-appellants, seven Caucasian officers of the Boston Police Department ("BPD" or the "Department"),[1] allege that their constitutional rights to equal protection were violated when the Department promoted three African-American police officers to sergeant instead of the appellants, who had the same ranking on the list of officers eligible for promotion.[2] The district court found that the race- conscious action of the City was narrowly tailored to the compelling state interests of remedying past discrimination and avoiding litigation, and therefore, passed strict scrutiny. *Cotter v. City of Boston*, 193 F. Supp. 2d 323, 357 (D. Mass. 2002). The district court also retained jurisdiction to consider future racially motivated decisions by the Department. *Id.* at 356-57. Appellants appeal the district court's decision, and the City cross-appeals on the issues of standing and retained jurisdiction. First, we find that appellants have standing to seek immediate promotion only.

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[1] The officers are Winifred N. Cotter, Vincent J. DiFazio, John P. Doris, William J. Dwan, William G. Knecht, Patrick L. Murphy, and Thomas L. Sexton.

[2] Plaintiffs originally filed suit against the City of Boston and James J. Hartnett, Jr., in his official capacity as Personnel Administrator of the Commonwealth of Massachusetts Human Resources Division. Hartnett settled with plaintiffs and was dropped from the suit. We permitted the Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO"), and Dennis A. White and Harold White, two of the African-American officers who were promoted to sergeant, to intervene as defendants. *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 37 (1st Cir. 2000). Except where their interests diverge, we refer to all defendants-appellees collectively as the "City."

Next, we affirm the district court's decision that the City's action was constitutional, finding that the City has demonstrated the compelling state interest of remedying past discrimination. Finally, we reverse the district court's retention of jurisdiction.

I. Background

A. Facts

In December, 1997, the BPD sought to promote thirty police officers to sergeant. A score was computed for each candidate who took a 1996 sergeant promotion examination given by the Human Resources Division ("HRD"). The score was based on a state examination, a Boston examination, education, and training. Following standard hiring procedure, the Department obtained a list ranking the top sixty-nine performers.

If promotions had been made in strict rank order, twenty-nine non-African-American officers and one African-American officer would have been promoted, all of whom had a score of eighty-five or higher. The Department determined that this promotional decision would violate the "four-fifths rule" in the EEOC's Uniform Guidelines on Employee Selection Procedures, indicating possible adverse impact on minority candidates.[3] *See* 29 C.F.R. § 1607.4(D) (2003).

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[3] The four-fifths rule provides that

> [a] selection rate for any race . . . which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be

Such adverse impact may signify that the testing or past hiring was discriminatory. For this reason, and others that we will discuss below, the BPD sought greater African-American representation among sergeants. Therefore, the Department promoted the top twenty-six officers in strict rank order; this included all officers scoring eighty-six and above, with the exception of one officer who was bypassed for cause. Seven non-African-American officers had scored eighty-five; two of them were promoted. Finally, the Department promoted the three African-American officers who had scored 84 (the "African-American Officers"), while choosing not to promote ten Caucasion officers who also scored eighty-four.

Because it had elected to promote officers scoring eighty-four before officers scoring eighty-five, the BPD was required by Massachusetts law to provide a statement to the HRD explaining the reasons for its departure from strict rank order.

> regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. § 1607.4(D). Had the BPD promoted in strict rank order, the selection rate for African-Americans would have been three percent (one African-American officer selected out of thirty-three who passed the examination) and the selection rate for non-African-Americans would have been fifteen percent (twenty-nine promoted out of 192 who passed the examination), for a selection ratio of twenty percent (three percent divided by fifteen percent). This result is well below the eighty percent guideline established by the EEOC.

See Mass. Gen. Laws ch. 31, § 27 (2002). The BPD sent a letter to the HRD stating that the departure from strict rank order to promote the African-American Officers was done to "ensure compliance with current EEOC guidelines, and applicable federal and state discrimination laws." The HRD rejected this explanation, contending that the BPD was erroneously acting under a terminated consent decree.[4]

In response to the HRD's rejection, the Department promoted six additional officers (one formerly bypassed for cause and five with a score of eighty-five). Thus, the end result was that all thirty-three officers scoring eighty-five and higher were promoted, the three African-American Officers scoring eighty-four were promoted, and ten non-African-American officers scoring eighty-four, including the seven Caucasian plaintiffs, were not promoted. Of the thirty-six officers promoted to sergeant, four were African-American and thirty-two were not African-American.

B. History of the Case

On May 21, 1999, plaintiffs filed suit against the City alleging that the Department violated plaintiffs' civil rights under 42 U.S.C § 1983 (2003) by failing to promote plaintiffs to sergeant because of their race.

After full discovery, the City moved for summary judgment, alleging that the plaintiffs lacked standing, and that the promotions of the African-American Officers were a

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[4] A consent decree governing sergeant promotions at the BPD was allowed to lapse in 1995.

narrowly-tailored means of meeting several compelling governmental interests. Specifically, the City claimed that the promotions furthered compelling governmental interests by (a) remedying past discrimination in the Department's promotions of minority officers to sergeant; (b) avoiding the reasonable likelihood of Title VII litigation if the Department made strict rank order promotions; and (c) meeting the Department's operational needs.

On March 22, 2002, the district court dismissed plaintiffs' claims and entered judgment in favor of the City. The district court found that the City's actions were a narrowly-tailored means of remedying the continuing effects of past discrimination and avoiding litigation. *See Cotter*, 193 F. Supp. 2d at 350. The district court retained jurisdiction post-judgment to oversee all of the Department's future hiring and promotional decisions involving race. *Id.* at 356-57. This appeal and cross-appeal timely followed.

II. Discussion

Summary judgment is appropriate upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2003). We review the district court's entry of summary judgment de novo, in the light most favorable to the losing party. *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). We may affirm the district court's decision on "any independent ground that is apparent in the record." *United States v. Puerto Rico*, 287 F.3d 212, 218 (1st Cir. 2002).

A. Standing

Article III of the Constitution confines the federal courts to deciding actual cases or controversies. *Allen v. Wright*, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). Inherent in this limitation is the notion that "federal courts may exercise power only as a last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Id.* at 752 (internal quotations and citations omitted). The most important Article III doctrine is that of standing, which ensures that plaintiffs have alleged a personal stake in the outcome of the controversy. Requiring a plaintiff to have standing sharpens the presentation of issues and illuminates difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962).

At an irreducible constitutional minimum, a party attempting to invoke federal jurisdiction must establish that (1) he has suffered an injury in fact, (2) the injury was caused by the challenged action of the defendant, and (3) a favorable ruling would likely redress his injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. *Allen v. Wright*, 468 U.S. at 752. We review the district court's standing decision de novo. *Donahue v. City of Boston*, 304 F.3d 110, 116 (1st Cir. 2002).

The plaintiffs sue under 42 U.S.C. § 1983, seeking damages, immediate promotion, and an order prohibiting the Department from considering race in future promotions. Since a plaintiff must establish standing for each type of relief sought, *id.* at 116, we consider appellants' standing to seek damages and injunctive relief separately.[5]

The appellants first argue that they have standing to obtain damages. Prior precedent bars this effort. In *Texas v. Lesage*, 528 U.S. 18, 145 L. Ed. 2d 347, 120 S. Ct. 467 (1999), the Supreme Court held that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983." *Id.* at 21. It is uncontested that had the Department not used race-conscious criteria, it would have only promoted candidates with a score of eighty-five or higher. Because appellants only scored eighty-four, they cannot show standing for damages.

Lesage could be distinguished on the ground that the plaintiff in that case received a lower score than all of the applicants who were admitted to the university program at issue there. By contrast, the appellants here earned the same score as the African-American Officers. However, this court in *Donahue v. City of Boston*, 304 F.3d at 114, read *Lesage* to encompass a situation similar to this one. In *Donahue*, the

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[5] The district court decision preceded our decision in *Donahue*, and the court found that plaintiffs had standing to pursue damages and injunctive relief. *Cotter*, 193 F. Supp. 2d at 337.

plaintiff police candidate had received a higher score on the relevant exam than did a minority officer who was hired. We applied *Lesage*, noting that the plaintiff had no chance of being hired regardless of the Department's affirmative action program. *Id.* at 119. This interpretation of *Lesage* controls here as law of the circuit. Several of our sister circuits have also found that plaintiffs lack standing to sue for damages if they cannot show that they would have benefitted had the government not considered race. *See Aiken v. Hackett*, 281 F.3d 516 (6th Cir.), *cert. denied sub nom. Ashton v. City of Memphis*, 154 L. Ed. 2d 23, 2002 U.S. LEXIS 5550, 123 S. Ct. 87 (Oct. 7, 2002); *McNamara v. City of Chicago*, 138 F.3d 1219, 1221 (7th Cir.), *cert. denied*, 525 U.S. 981, 142 L. Ed. 2d 398, 119 S. Ct. 444 (1998) ("A plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court."); *Grahek v. City of St. Paul*, 84 F.3d 296, 298 (8th Cir. 1996) (finding Caucasian male candidates for police officer positions lacked standing because they could not show that they would have been promoted, even if the police department had not made use of a list of "protected class applicants").

Appellants next argue that they have standing to seek immediate promotion. While one could imagine that this issue could similarly be resolved against the appellants under *Donahue* and *Lesage*, neither of those cases addressed standing for this type of immediate injunctive relief. Instead, both of those cases focused only on standing to seek an injunction to prevent future violations. Thus, neither of those cases, nor any other binding precedent, mandates a certain result here.

Two of the appellants have been promoted to sergeant since this lawsuit was filed, and therefore lack standing to seek immediate promotion. We think that the remaining appellants have made a colorable claim of standing to seek immediate promotion. The Department has promoted African-American officers who obtained the same score as the appellants and there is no indication that the Department would consider demoting the promoted African-American Officers. If we assume *arguendo* that the Equal Protection Clause prohibits racial discrimination on these facts and permits the injunctive relief sought by the appellants, then it is sufficiently clear that the appellants would have suffered a cognizable injury for standing purposes.

There is a different form of injunctive relief not explicitly mentioned in the plaintiffs' complaint but arguably embraced by their briefs, namely, that if unlawful discrimination occurred in this case, such discrimination should be barred in future promotion contests involving these plaintiffs. A plaintiff challenging an ongoing race-conscious program satisfies the injury requirement if he shows (1) a likelihood that he will compete for the governmental benefit in question in the future, and (2) that he will be prevented from competing on equal footing because of the government's discriminatory practice. *Donahue*, 304 F.3d at 119; *accord N.E. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993). The difficulty here is that the circumstances are so peculiar that it is at least debatable whether a likelihood of recurrence is sufficient to justify standing on a future repetition theory. *See, e.g., Yeager v. Gen. Motors Corp.*, 265 F.3d 389, 395 (6th Cir. 2001) (finding plaintiff's possible future injury too speculative to

grant him standing). Since on the merits we find that there was no unlawful discrimination, the question of whether there would be standing for this form of relief need not be resolved here.

B. Affirmative Actions and Strict Scrutiny

There is rich public debate about the issue of affirmative action. Some argue it is racial discrimination and is inconsistent with a color-blind constitution, while others believe that it is necessary to put long-oppressed groups on equal footing with the majority. Our job is not to endorse one view over the other, but to simply evaluate the constitutionality of any racially-motivated governmental program.

The Equal Protection Clause of the Fourteenth Amendment provides, in part, that "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Clause does not mandate that every citizen be treated identically, rather, it requires an adequate explanation for treating groups differently. Race-based distinctions are inherently suspect and are therefore subject to the most searching examination. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986). The BPD's racially-based promotional decision must withstand strict scrutiny -- the government must show that the classification is narrowly tailored to further a compelling

governmental interest.[6] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995).

Whether each proffered reason satisfies strict scrutiny is a question of law or a question of how the law applies to the facts; therefore, our review is plenary. *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998).

In order to be a "compelling interest," the government must show that the alleged objective was its actual purpose for the discriminatory classification and must have a "strong basis in evidence to support that justification before it implements the classification." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996). Appellants argue that the Department only presented one justification for its decision to the HRD, and is therefore barred from asserting any other motivations. We disagree. Commissioner Evans testified that there were several reasons for his decision to depart from strict rank order in awarding promotions, including remedying past discrimination, avoiding lawsuits, and the operational needs of the Department. It is plausible

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[6] The district court stated that "the burden of persuasion rests upon the Plaintiffs to show that the promotion decisions were unconstitutional." *Cotter*, 193 F. Supp. 2d at 338 (citing *Wygant*, 476 U.S. at 277-78 (O'Connor, J., concurring)). While it is true that the ultimate burden of proof in a civil trial lies with the plaintiffs, the Supreme Court has made clear that the government has a burden of production to justify a racial preference. *See Adarand*, 515 U.S. at 224; *cf. United States v. Virginia*, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) (placing the burden on the state to justify a gender classification).

that the Department did not feel the need to identify the multiple factors influencing its decision. If any of the justifications is a compelling state interest, and the City's actions were narrowly tailored to that end, the City's actions are constitutional.[7]

C. Remedying Past Discrimination

The City asserts that the race-conscious action was necessary to ameliorate "vestiges" of past discrimination by the Department against African-American applicants and officers. The remedying of past discrimination is a compelling state interest, so long as there is a "strong basis in evidence for the conclusion that the [government action] serves a remedial purpose with respect to past discrimination." *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991) (citation omitted); *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 20 (1st Cir. 1998) (hereinafter "*Boston Superior Officers*"). There must be evidence of discrimination specific to the governmental agency seeking to use racial preference; "societal" discrimination, on its own, will not support affirmative action. *Wygant*, 476 U.S. at 276. "Whether past discrimination necessitates current action is a fact-sensitive inquiry." *Wessmann*, 160 F.3d at 802. The "strong basis in evidence" may consist of "either a

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[7] Appellants also argue that the government is prohibited from asserting alternative "compelling interests" because if one interest fails it demonstrates that the action taken by the government cannot be narrowly tailored, and the entire action therefore fails. We disagree with this argument. A governmental actor may have several reasons for racially-motivated action; if any legitimate reason satisfies strict scrutiny, the action is constitutional.

contemporaneous or antecedent finding of past discrimination by a court or other competent body, or evidence approaching a prima facie case of a constitutional or statutory violation." *Boston Superior Officers*, 147 F.3d at 20 (citation omitted).

The Department's history of discrimination is well-documented by past litigation and records. We outlined the history of past discrimination at the Department a few years ago in *Boston Superior Officers*, where we found:

> In 1972, we affirmed a district court's finding that the BPD discriminated against black applicants through the use of entry-level testing procedures that favored whites. . . . That discrimination resulted in a gross racial disparity among the BPD's ranks .
>
> . . .
>
> [Nineteen years later we found] . . . that racial discrimination in entry-level hiring had adversely affected blacks' representation at the rank of sergeant. "Remedial action takes time," we reasoned, "and discrimination may linger for many years in an organization that had excluded blacks from its ranks."

Boston Superior Officers, 147 F.3d at 20 (quoting *Stuart*, 951 F.2d at 452). In his deposition, Commissioner Evans also expressed the concern that remedying past discrimination

takes time.[8] The Department has been working for many years to address racial disparity and bias within its ranks. In 1965, only two percent of police officers in the City were not Caucasian, and only one minority held a position of sergeant or above. In 1978, only five-and-a-half percent of officers were African-American, and only three officers held a position of sergeant or above. While the numbers are more representative today, we are not prepared to rule that all effects of past discrimination have been eliminated. *See Boston Superior Officers*, 147 F.3d at 23 ("Given the BPD's halting and, at time, quite modest progress in remedying its earlier discrimination, we are reluctant to infer that the vestiges of that discrimination had substantially disappeared when the BPD [made the affirmative action promotion at issue.]").

At the time of the promotions at issue here, the disparity between the number of African-American officers eligible for

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[8] Commissioner Evans stated:

> When I came on the Department there [were] very small numbers of minority officers, and I think there [were] none in my class of 66, and pretty much my class and classes before me are running the organization right now, . . . and I think it takes a while within any organization, that there has to be role models and other people in position so that other people will move up and I think it takes a while for that type of historic discrimination that was found in *Castro v. Beecher*, [459 F.2d 725 (1st Cir. 1972)]to work itself out. It doesn't happen overnight.

promotion and the number of non-African-American officers eligible for promotion was statistically significant. One explanation for this discrepancy is the fact that the rankings were based, in part, on experience. Because of the well-documented history of discrimination within the Department, fewer African-Americans are in position to be promoted to sergeant. *See United States v. Paradise*, 480 U.S. 149, 168, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987) ("Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by nonminorities.").

The Department was faced with facts that its efforts at remedying past discrimination had not been successful. A public employer has the requisite firm basis for believing that remedial action is necessary if there is a statistical disparity between the racial composition of the workforce and the relevant, qualified employment pool. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring); *see also Wessmann*, 160 F.3d at 803 ("The greater the disparity [between the number of qualified minority applicants with those who gain entrance], the stronger the inference that discrimination is the cause of non-entry.").

In October, 1996 (the latest date before the African-American Officers were promoted for which data is available), African-Americans comprised 25.02% of the BPD's 1,547 officers, but only 16.49% of the BPD's sergeants. This difference is statistically significant, and not reasonably attributed to chance. This disparity is not just a simple assurance of good intention from the City, but concrete evidence that discrimination existed at the time the African-American Officers were promoted.

In addition, as noted above, had the Department promoted in strict rank order, the selection rate for African-Americans would have been only three percent, while the selection rate for Caucasians would have been fifteen percent. This would have yielded a selection ratio of twenty percent, well below the eighty percent guideline established by the EEOC, and therefore suggested adverse impact on minorities. While not "conclusive evidence of discrimination," this discrepancy in selection rate does serve as a "'benchmark against which . . . to gauge [the City's] efforts to remedy past discrimination.'" *Boston Superior Officers*, 147 F.3d at 21 (quoting *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 478, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986) (plurality opinion)). In this case, the selection ratio would have been only twenty percent, indicating that the City had not yet remedied past discrimination.

Commissioner Evans, who made the decision to promote the African-American Officers, was aware of racial tensions within the Department. Officers had complained to him about disparate treatment, including racially-based punishment and job assignment. Officers had also complained to him that they felt racially targeted following an incident where a noose was placed on an officer's motorcycle.

The City's evidence of disparity in the promotion of officers to sergeant, current racial tensions within the Department, and the documented history of past discrimination within the BPD created the strong basis in evidence required for the Department to conclude that race-conscious action was necessary. Past discrimination in the hiring of minorities has limited the opportunity for minorities to move up through the ranks, and recent statistics show that

these effects remain. We hold that the City has therefore demonstrated that it acted in response to a compelling state interest -- that of remedying past discrimination. *See Majeske v. City of Chicago*, 218 F.3d 816, 823 (7th Cir. 2000), *cert. denied*, 531 U.S. 1079, 148 L. Ed. 2d 676, 121 S. Ct. 779 (2001) (holding that statistical evidence of disparity within a police department coupled with anecdotal evidence of discrimination sufficiently establishes a compelling state interest that justifies an affirmative action plan). At this point in time, we find that the City has presented sufficient evidence that past discrimination within the Department justified its race-conscious decision.

Next, we determine whether the action taken by the City in its effort to remedy past discrimination was narrowly tailored to rectify the specific harm in question. *Wessmann*, 160 F.3d at 807. We consider several factors in determining whether an affirmative action order was narrowly tailored, including

> the extent to which (i) the beneficiaries of the order are specially advantaged; (ii) the legitimate expectancies of others are frustrated or encumbered; (iii) the order interferes with other valid state or local policies; and (iv) the order contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration.

Boston Superior Officers, 147 F.3d at 23 (quoting *Mackin v. Boston*, 969 F.2d 1273, 1278 (1st Cir. 1992)).

The City departed from strict rank order to promote three African-American officers out of thirty-six promotions. The Department would have had to promote twenty African-American officers to create a situation whereby the percentage of African-American officers and African-American sergeants was approximately equal. The necessity for relief was great, but the means chosen by the Department were modest -- only three African-American officers were promoted out of rank -- indicating narrow tailoring. *See McNamara*, 138 F.3d at 1224 ("The [narrow tailoring] test is . . . whether the increase is a plausible lowerbound estimate of a shortfall in minority representation among [sergeants] that is due to the [Department's] intentional discrimination in the past.").

Only qualified minorities were promoted; they were therefore not "specially," or unfairly advantaged by their promotions. *See Boston Superior Officers*, 147 F.3d at 24. All officers were competing for a limited number of spots. Because of this competition, the City's promotion of the African-American Officers did not disturb any legitimate, firmly rooted expectations of the appellants. *See id.; accord Mackin*, 969 F.2d at 1278. Had the City not departed from strict rank order, no additional Caucasian officers would have been hired.[9] *See McNamara*, 138 F.3d at 1222 (defining narrow tailoring as that which "discriminates against Caucasians as little as possible consistent with effective remediation").

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[9] Had the City not considered race in the promotions, only thirty promotions would have been made -- twenty-nine Caucasian officers and one African-American officer. As a result of the affirmative action plan, those same twenty-nine Caucasian officers were promoted.

No valid policies have been disturbed by hiring three qualified African-American sergeants. While Massachusetts law requires an explanation for promotions made outside of strict rank order, there is no prohibition on such out-of-rank decisions. *See* Mass. Gen. Laws ch. 31, § 27.

Finally, there were no quotas or long-term guidelines established, and there is nothing in the decision requiring affirmative action in future decisions. The decision is therefore limited in scope and duration. We therefore agree with the district court that the City's actions were a narrowly-tailored means of addressing demonstrated past discrimination.[10]

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[10] We need not reach the issues of whether avoiding litigation or meeting the operational needs of the Department are compelling state interests. We are skeptical of the first justification, however: the City's claim that it promoted the African-American Officers in order to avoid litigation rings hollow, as litigation nevertheless ensued. We are much more sympathetic to the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing. This operational needs justification has been cited as a compelling state interest by other Circuits. *See Patrolmen's Benevolent Ass'n of N.Y., Inc. v. City of N.Y.*, 310 F.3d 43, 52 (2d Cir. 2002) ("[A] law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves, may constitute a compelling state interest.") (quotation and citation omitted); *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002); *McNamara*, 138 F.3d at 1222; *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996); *cf. United States v. Paradise*, 480 U.S. 149, 167 n.18, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987) (not deciding whether operational needs could be a compelling state

D. Retained Jurisdiction

At the conclusion of its analysis, the district court sought to eliminate future litigation regarding race-based decisions by the City. Analogizing to the *cy pres* doctrine of trusts and estates, whereby parties may petition the court to modify the purpose of a gift because the original purpose has become impractical or impossible, the court retained jurisdiction to review future race-conscious decisions by the City. The court held:

> Accordingly, this Court will retain jurisdiction post judgment, and directs the City, whenever the Department seeks to use racial factors in hiring or promotion decisions, to formulate its personnel decision and then petition the Court for instructions concerning whether such a racially motivated decision passes constitutional muster. The Department shall so petition this Court both when it "reaches down" to hire or promote a lower scoring individual on the basis of race, and when it picks among candidates who are tied on a civil service exam on the basis of race. On its part, the Court will give notice to all affected parties, including MAMLEO, and promptly will hold a hearing, entertain argument, and render a decision. Done properly, such a procedure ought further predictability, hold down the burgeoning legal costs of this sort of

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interest).

> litigation, and, most important, further the general societal acceptance of the required nuanced balancing.

Cotter, 193 F. Supp. 2d at 356-57.

Whether the district court has the authority to retain jurisdiction is a question of law that we review de novo. See *David C. v. Leavitt*, 242 F.3d 1206, 1209-10 (10th Cir. 2001). If the court has such discretion, we review its decision for an abuse of discretion. *See id.* at 1210.

A federal court may exercise ancillary jurisdiction to enforce its judgments. *Peacock v. Thomas*, 516 U.S. 349, 354, 133 L. Ed. 2d 817, 116 S. Ct. 862 (1996); *see also* 28 U.S.C. § 1367 ("in any civil action over which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case and controversy."). While a federal court has the power to retain jurisdiction to enforce its decision, the Supreme Court has cautioned against the exercise of ancillary jurisdiction "over proceedings that are entirely new and original." *Peacock*, 516 U.S. at 358 (internal quotation omitted).

With respect to the district court's attempt to retain jurisdiction over future hiring decisions, neither party addressed hiring at any point in the litigation. The hiring policies of the BPD were not before the court, and it therefore lacks authority to retain jurisdiction over those absent claims. *Cf. Rodriguez v. Doral Mort. Co.*, 57 F.3d 1168, 1174 (1st Cir. 1995) ("A federal district court may not, of its own

volition, after the parties have rested, recast the complaint and, without notice, predicate its decision on a theory that was neither pleaded nor tried.").

In addition to the standing requirement discussed in Part IIA, *supra*, Article III's cases and controversies language prohibits federal courts from issuing advisory opinions. *Preiser v. Newkirk*, 422 U.S. 395, 401, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975). A court may not "decide questions that cannot affect the rights of litigants in the case" before it. *Id.* (quotation and citation omitted). The issue of racial preference in hiring by the BPD was never a live, on-going case or controversy in this litigation, and any future decision by the district court regarding hiring would simply be an advisory opinion. The district court therefore lacked subject matter jurisdiction to retain jurisdiction over hiring decisions of the Department.

We further conclude that the retention of jurisdiction over future promotional decisions was an abuse of discretion. "Ancillary enforcement jurisdiction is, at its core, a creature of necessity. When a party has obtained a valid federal judgment, only extraordinary circumstances, if any, can justify ancillary jurisdiction over a subsequent" action. *Peacock*, 516 U.S. at 359. There are simply no extraordinary circumstances in this case necessitating the retention of jurisdiction.

First, the district court found *in favor* of the City, and upheld the racially-motivated promotional decision. There was no order by the district court that required enforcement and there is no longer a live issue in this case. Second, this case is not analogous to the situations where the Supreme

Court has found continued jurisdiction necessary. Such measures were taken in school desegregation cases, where retention of jurisdiction was necessary because of the continued refusal of school districts to rectify their unconstitutional segregation, and prison reform cases, where continued jurisdiction was necessary because states refused to follow court orders. *See Regensburger v. City of Bowling Green*, 278 F.3d 588, 598 (6th Cir. 2002) (Batchelder, J., concurring) (finding that a case was not analogous to school desegregation or prison reform cases, and that the district court therefore abused its discretion in retaining jurisdiction); *Sierra Club v. Lynn*, 502 F.2d 43, 66-67 (5th Cir. 1974) (finding no constitutional basis to support continued exercise of federal judicial power where no analogy could be made to desegregation cases). In the present case, the City has done nothing to violate appellants' constitutional rights, and has never demonstrated unwillingness to comply with a court order. Further, there is no evidence that the City will make future unjustified race-based decisions simply because it has prevailed in this case. The City has not behaved in such a way that would require ongoing supervision of its decisions.

The district court was frustrated in being faced with a lawsuit challenging affirmative action after what the court perceived as the City's promise, in a prior lawsuit, that it would no longer use affirmative action. *See Cotter*, 193 F. Supp. 2d at 355. We believe that the district court misreads *Boston Superior Officers*, which did not include a promise by the City to refrain from race-conscious decisionmaking. Rather, the fact that the Department promoted one sergeant, rather than establishing a quota or some other long-term program, demonstrated that the action was narrowly tailored. *Boston Superior Officers*, 147 F.3d at 25. Furthermore, we

explicitly left open the question of whether the Department could make future race-based decisions. We stated:

> Our conclusion that the BPD was justified in taking race-based remedial action is based strictly on these unique circumstances, and does not give the BPD a license to depart from strict rank order in future promotions. *Whether any similar factors are left that might warrant future remedial action is a question that we need not now address . . . .*

Id. (emphasis added). So long as the City's actions are constitutional (as the promotion of the African-American Officers was in this case), the City is permitted to consider race in its decisions.

We have no doubt that a lawsuit will be filed should appellants or anyone else believe that a future racially-motivated decision of the Department violates their constitutional rights. Subject to the standing requirements discussed above, this will create an actual case or controversy for the federal courts to adjudicate. Until that time, the court lacks the power and necessity to decide constitutional issues regarding the City's promotional decisions.

In short, the district court lacked the subject matter jurisdiction to retain jurisdiction over future hiring decisions, and lacked the necessity required to retain jurisdiction over future promotional decisions. We therefore vacate the district court's retention of jurisdiction over future race-based decisions of the Department. "This solution relegates the federal judiciary to its proper limited position, allows the

legislative branch full sway within constitutional boundaries, and prevents continuing friction between the federal judiciary and a state entity." *Regensburger*, 278 F.3d at 598-99 (Batchelder, J., concurring).

III. Conclusion

"The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand*, 515 U.S. at 237. The City has sought to remedy its past discrimination within the Department through the selective promotion of three African- American officers. The City's action was constitutional. There is no reason for the district court to retain sweeping jurisdiction over all hiring and promotional race-conscious decisions of the Department.

We therefore affirm the district court's decision that the City's actions did not violate appellants' constitutional rights and reverse the district court's retention of jurisdiction.

Affirmed in part and reversed in part.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-11101-WGY

[Decided March 21, 2002]

WINIFRED N. COTTER, VINCENT J. DIFAZIO, JOHN P. DORIS, WILLIAM J. DWAN, WILLIAM G. KNECHT, MICHAEL LOCKE, PATRICK L. MURPHY, and THOMAS L. SEXTON,
Plaintiffs,

v.

CITY OF BOSTON,
Defendant,

and

MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, DENNIS A. WHITE, and HAROLD WHITE,
Defendant-Intervenors.

MEMORANDUM AND ORDER

YOUNG, C.J.

I. INTRODUCTORY BACKGROUND

This is a case of alleged racial discrimination. Such cases come in two types.

The first involves allegations of public or private racial discrimination which are denied. While such cases give rise to complex problems of proof, the duty of a court once racial discrimination is established is clear and undoubted -- to extirpate racial discrimination root and branch, adequately compensate its victims, and creatively invoke its equitable powers to provide equal opportunity to all citizens free of the blight of racial animus.

The second involves state-sponsored racial discrimination. Since, in certain narrowly-tailored circumstances, such state sponsored discrimination is at present undoubtedly lawful, such cases necessarily involve an exploration of whether justifying circumstances exist. This is such a case.

At the outset, therefore, it is appropriate to acknowledge two extraordinarily difficult aspects of any such case which sadly but inevitably make its resolution suspect and less acceptable to our society as a whole than is usually the case with a carefully-considered judicial opinion.

The first is a problem of definition. As a society we acknowledge and bewail our deeply troubled racial history -- the horrors of slavery, the tawdry (and frequently violent) legacy of Jim Crow, the subtle (and not so subtle) resistance to conferring genuine equal rights and equal opportunities

upon all Americans. When we attack racial discrimination head on, problems of racial definition rarely arise because they are subsumed in the proof that a particular person or group has, in fact, been the victim of discrimination on the basis of racial animus.

When the state itself seeks to discriminate on the basis of "racial factors," however, and claims such discrimination is legally justified, then the problem of definition becomes acute because all Americans are vitally interested in precisely the basis upon which the state determines to confer governmental benefits such as jobs and promotions. Unfortunately, one searches the authoritative decisions in vain for any adequate definition. The decisions rather casually use terms such as "white," "black," "African American," "Hispanic," "Native American" and the like, as though we all agreed on their meaning in the specific case. Of course, we do not. *See generally, e.g.*, Rachel F. Moran, *The Mixed Promise of Multiculturalism*, 17 Harv. BlackLetter L.J. 47 (2001) (arguing that race is becoming a more fluid concept in America as demographics change, and that different racial groups have very different views on the desirability of embracing multiracial identities); Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 Harv. BlackLetter L.J. 33 (2001) (contending that race is a social and political construct, unsupported by biology, in which courts and lawmakers have acquiesced despite the absence of a foundation for doing so, and that legal recognition of mixed-race groups might help to break down rigid notions of race). There is more wisdom in Tiger Woods calling himself "Cablinasian," *see, e.g.*, Michael A. Fletcher, *Woods Puts Personal Focus on Mixed-Race Identity*, Wash. Post, Apr. 23, 1997, at A1, than in all the gross racial

classifications found in the governing decisions and the executive actions implementing race-based public policies.

Nor is the lack of definition surprising. If we go beyond self-definition and seek to confer some genuine meaning upon race-based identifiers, we rapidly find ourselves slipping into the most abhorrent racial stereotyping and classification -- the very conduct directly forbidden by our Constitution and laws. We simply cannot condemn the notorious black codes, *see, e.g.*, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 199-201 (1988) (outlining provisions of state black codes); Theodore Brantner Wilson, *The Black Codes and the South* 66-70, 72-75, 78-80 (1965) (same), and Nazi eugenics, *see, e.g.*, 4 Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy & Aggression* 8-9 (1946) (Nazi citizenship law defining who is and who is not a Jew in order to disqualify Jews from German citizenship), *quoted in part in Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (Stevens, J., dissenting), while at the same time looking behind self-identification. The very idea of imposing some lexicon of United States government racial definitions is revolting.

Here the parties neatly sidestep the issue. This case involves a certain police promotional examination. Those who took the exam were asked to assign themselves to one of a number of pre-fixed racial identifiers. Not everyone did so. Those who did not were nevertheless consigned to a pre-fixed racial classification from the records of the Boston Police Department. It is unclear whether these records are the result of self-classification or observations by someone within the

Department.[1] As no party here challenges or seeks to examine these racial classifications, the Court adopts them, pointing out here that they are in the main based on individual self-identification, while a minority of exam takers were somehow assigned a pre-fixed racial classification by the Boston Police Department.

Second, the most difficult aspect of this case is the basic premise upon which the Court is required to approach it. Simply stated, the premise is that, as we ultimately seek a colorblind society under our Constitution, it is necessary in certain circumstances to discriminate along racial lines to move toward that society. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part) ("In order to get beyond racism, we must first take account of race."). So imbedded is this premise in our constitutional jurisprudence that it is not for this Court to question it. Still, as discrimination necessarily begets discrimination, as racial discrimination is perhaps our society's most tragically divisive fault line, and as "our government is the potent, the omnipresent teacher" that

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[1] Racial classification of United States government employees is routine and is frequently done on the basis of cursory visual observation. The federal courts, for example, gather data about the racial and ethnic background of employees primarily by relying upon individual self-identification, but when an individual does not self-identify, "visual identification may serve as the basis for providing the information. (That is, supervisory personnel should observe individual employees and provide the data based on observations.)" Admin. Office of the U.S. Courts, *The FY 2001 Fair Employment Practices Report* 4 (2001).

"teaches the whole people by its example," *Olmstead v. United States*, 277 U.S. 438, 468, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting), one cannot help but recall the reflexive statement of the field artillery officer in Vietnam: "We had to destroy the village to save it."

II. PRIOR PROCEEDINGS

Winifred N. Cotter, Vincent J. DiFazio, John P. Doris, William J. Dwan, William G. Knecht, Michael Locke, Patrick L. Murphy, and Thomas L. Sexton (collectively the "Plaintiffs"), all members of the Boston Police Department (the "Department"), brought this section 1983 action against the City of Boston (the "City") and James J. Hartnett, Jr. ("Hartnett"), in his official capacity as Personnel Administrator of the Commonwealth of Massachusetts Human Resources Division (the "Division"). The Plaintiffs allege that the City and Hartnett unlawfully discriminated against them in promoting to the rank of sergeant three black officers (the "Black Officers") who scored 84 on a 1996 civil service exam (the "1996 exam"), while declining to promote the Plaintiffs, who also scored 84. The Plaintiffs claim that the City and Hartnett violated the Fifth and Fourteenth Amendments to the Constitution.[2] The Massachusetts Association of Minority

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[2] The Court dismissed the Plaintiffs' Fifth Amendment claim from the bench on January 9, 2001 [Docket No. 165]. The Fifth Amendment, though it does not expressly guarantee equal protection under law as does the Fourteenth Amendment, is generally understood to include within its due process guarantee an equal protection component akin to that found expressly in the Fourteenth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500, 98 L. Ed. 884, 74 S. Ct. 693 (1954). This guarantee extends,

Law Enforcement Officers ("MAMLEO"), along with two of the Black Officers, Dennis A. White and Harold White, entered the lawsuit as defendant-intervenors after getting permission from the First Circuit, *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31 (1st Cir. 2000), while Hartnett exited the lawsuit by settling with the Plaintiffs.

All of the parties remaining have filed cross-motions for summary judgment. The City acknowledges that it considered race in making its promotion decisions, but responds that it is nonetheless entitled to summary judgment for two reasons. First, the City contends that the Plaintiffs lack standing to complain of the City's race-conscious decision because the City would not have promoted the Plaintiffs even if the City had made its promotion decisions without regard to race. Second, the City argues that even if the Plaintiffs have standing, the City's actions were narrowly tailored to further three compelling government interests: advancing the operational needs of the City by ensuring a diverse police force that represents the communities it serves, remedying past discrimination perpetrated by the Department against minorities, and avoiding a lawsuit from MAMLEO or disgruntled minority officers.

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however, only to those denied the equal protection of the laws by the *federal* government. *E.g., Gerena v. P.R. Legal Servs., Inc.*, 697 F.2d 447, 449 (1st Cir. 1983). Those denied equal protection by the action of a state or local government are left to pursue relief under the Fourteenth Amendment. There are no federal actors involved in this litigation, and so the Plaintiffs' proper avenue of relief is under the Fourteenth Amendment, rather than the Fifth Amendment.

MAMLEO's motion for summary judgment focuses on the past discrimination of the Department, and on the disparate impact the 1996 exam had on minority officers vis-a-vis white officers. MAMLEO posits that the City's interests in complying with applicable federal antidiscrimination law and, correlatively, in avoiding a lawsuit from MAMLEO or others that they claim would have surely followed from the violation of such law, constitute compelling state interests. Completing the strict scrutiny two-step, MAMLEO argues that the City's actions were narrowly tailored to further those interests.

The Plaintiffs reject these arguments and respond with a summary judgment motion of their own. The thrust of the Plaintiffs' argument is that most of the justifications for the City's use of race in making the promotion decisions are *post hoc* rationalizations that were not considered by the City at the time it made the decisions. According to the Plaintiffs, the only justification that was actually considered at the time of the promotion decisions was compliance with the EEOC Uniform Guidelines on Employee Selection Procedure (the "EEOC Guidelines"), which the Plaintiffs claim are no longer applicable to the Department as a result of the expiration of a consent decree between the Department and MAMLEO that arose out of prior litigation. As such, according to the Plaintiffs, the City is left with no valid, much less constitutionally compelling, justification for its admittedly race-based actions. The Plaintiffs argue further that, even if any of the justifications proffered by the City were actually considered by the Department at the time the decisions were made, and even if they are ruled to be compelling by this Court, the promotion decisions were not narrowly tailored, because other, less race-conscious measures were available.

III. UNDISPUTED FACTS

On October 19, 1996, the Division administered the 1996 exam for the purpose of selecting police officers within the Department for promotion to the rank of sergeant. Am. Compl. ¶ 18 [Docket No. 13]; Callahan Aff. ¶ 8 [Docket No. 94]. Thirty-three black officers and 192 non-black officers achieved a passing score.[3] Callahan Aff. ¶ 11. In September 1997, the Department decided to promote 30 police officers to the rank of sergeant. *Id.* ¶ 8; Evans Aff. ¶ 3 [Docket No. 93]. In October 1997, the Division certified a list of 69 candidates from all of the applicants who passed the 1996 exam;[4] the scores of the candidates on the certified list ranged from 92 to 82. Am. Compl. Ex. A; Callahan Aff. Ex. A. It was from this list certified by the Division that the Department was to draw in making promotions to sergeant. In December 1997, the Department promoted 30 police

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[3] A score of 70 or better was required to pass the written exam. Rutkowski Aff. Ex. 15 ¶ 6 (Expert Report of Kathleen K. Lundquist) [Docket No. 105].

[4] The Division places all applicants who pass a particular civil service exam on an "eligibility list." From the eligibility list, the Division places 2n + 1 candidates, with n representing the number of positions requisitioned by the particular agency, on a "certified list." It is from this certified list that the particular agency is to draw in making selection decisions and, with few exceptions, the agency is to proceed in strict numerical or rank order in making such decisions, selecting those who scored highest on the exam downward until the desired number of selections is made. Callahan Aff. PP 3-7.

officers to sergeant from the certified list. Evans Aff. ¶ 3; Callahan Aff. ¶ 8.

Before making the promotions, however, the Department discovered that if it promoted in strict rank order from one to 30, 29 non-black officers and only one black officer would be promoted. *Id.* ¶ 9. The Department further learned that such a promotion plan would violate the EEOC Guidelines "four-fifths rule," which states that a selection procedure adversely impacts minorities if it yields a selection percentage for candidates from a minority group that is less than four-fifths of the selection percentage for non-minority candidates, 29 C.F.R. § 1607.4(D).[5] Callahan Aff. ¶ 9. Specifically, the Department calculated that if it promoted only one black officer out of the 33 black officers who passed the 1996 exam (3% selection percentage) while promoting 29 non-black officers out of the 192 who passed the 1996 exam (15% selection percentage), the ratio of the black officer selection percentage to the non-black officer selection percentage would be around 20% (3% divided by 15%), *id.* Ex. B, well below the 80% required to avoid an inference of disparate impact. The Department therefore thought that it might be vulnerable to litigation by minority officers unless it promoted an additional three black officers, which would yield a total of four black officers promoted and would bring the Department

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[5] The four-fifths rule specifically provides that "A selection rate for any race . . . which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4(D).

into compliance with the four-fifths rule. This change would lead to a 12% selection percentage among black officers (4/33) compared to a 14% selection percentage among non-black officers (26/192), yielding a black/non-black selection percentage ratio of approximately 89%. *Id.* Ex. B.

The Department's December 1997 promotions therefore included the three Black Officers who scored 84 on the 1996 exam, but excluded five non-black applicants who scored 85 on the 1996 exam. Because the Department's promotion decisions departed from a strict rank order approach, the Department submitted an explanation to the Division for its decisions, as is required by law, Mass. Gen. Laws ch. 31, § 27. The Department explained to the Division that the Department believed that the departure was necessary in order "to ensure compliance with current EEOC guidelines, and applicable federal and state discrimination laws." Am. Compl. Ex. B. The Division, believing that the Department's explanation for the departure was premised on an incorrect assumption that the Department was still bound by a consent decree between MAMLEO and the City that had expired in 1995 which explicitly required the City to comply with the EEOC Guidelines, rejected this departure from strict rank ordering. *Id.* Ex. D.

Because the Department had already made the promotion decisions that were now being challenged by the Division, it was loathe to alter its decision in a way that would require it to rescind offers of promotion already made. Accordingly, the Department responded to the Division's objection by requisitioning from the Division six additional sergeant positions, so that the Department could promote the five officers who scored 85 on the 1996 exam who were bypassed

under the original proposal, Evans Aff. ¶ 8, and one officer who was originally bypassed for cause, Callahan Aff. at 4 nn.1-2, while maintaining the promotional status of the Black Officers, Am. Compl. Ex. G. This yielded a total of 36 new sergeants, 32 of whom were white, four of whom were black. Callahan Aff. ¶ 15. The Division did not object to this arrangement. *Id.* ¶ 14. Although the revised promotion arrangement technically proceeded in strict rank order, ten white officers who scored 84 were not promoted. Seven of those officers filed suit against the City and Hartnett, in his official capacity as Personnel Administrator for the Division.

Since the promotions at issue in this case, the Department has not relied on the 1996 exam to make any more promotions to the rank of sergeant. Callahan Aff. ¶ 16. Another exam was administered in 1998, *id.* ¶ 17, and all promotions to sergeant since the ones at issue here have proceeded in strict rank order, except for bypasses for cause, which are usually for disciplinary reasons, Evans Aff. ¶ 13.

IV. DISCUSSION

The parties do not dispute the facts as they are presented above. The Plaintiffs allege that the City improperly took account of race when it made its promotions decisions based on the 1996 exam. The City acknowledges that it took account of race in making the promotion decisions. According to the City, however, its use of race was constitutionally permissible, a limited and targeted method of achieving the City's compelling government interests. This Court is thus not charged with the responsibility of assessing conflicting factual accounts to determine whether, when construed most favorably to the non-moving party, the facts would permit a

favorable ruling for that party (the typical trial court responsibility at the summary judgment stage). Rather, this Court must determine whether the reasons proffered by the City for its unmistakably race-conscious action are legally sufficient justifications.

Before turning to the merits of the Plaintiffs' Fourteenth Amendment claim, however, the Court addresses the question whether the Plaintiffs have standing to litigate this case in the first place.

A. Standing

The first defense raised by the City is its argument that the Plaintiffs would not have been promoted even if the Department had not taken account of race in making the promotions, and thus they have no standing to complain of the Department's use of race. City's Mem. at 4-6 [Docket No. 92].[6] In support of this contention, the City states that had it not been allowed to consider race in making promotions to sergeant from the 1996 exam, then *no one* who scored 84 on the exam, including the Plaintiffs, would have been promoted. *Id.* at 5; Evans Aff. ¶ 12. Instead, the City would have promoted 30 officers in accordance with its original

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[6] This recently-filed memorandum appears to be the first time the City has raised the issue of standing. Because a challenge to a plaintiff's standing to pursue the case calls into question the jurisdiction of a federal court over the subject matter of the action, *Raines v. Byrd*, 521 U.S. 811, 818, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997), however, the challenge may be raised by any party at any point during the litigation, and may in fact be raised by a court sua sponte, Fed. R. Civ. P. 12(h)(3).

requisition, but would have proceeded in strict rank order, meaning that only those candidates who scored 85 or higher, and only some of those who scored 85, would have been promoted. City's Mem. at 5; *see also* Am. Compl. Ex. A (certified list in rank order). The Plaintiffs, who scored 84, would not have been promoted even under this strict rank order approach.

1. Standing Generally

Article III of the Constitution limits the power of the federal courts to actual cases or controversies. *See* U.S. Const. art. III, § 2. To give meaning to this otherwise open-textured provision, the Supreme Court has established three criteria that form the "irreducible constitutional minimum" that must be shown in order for a plaintiff to have standing:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (citations and internal

quotation marks omitted). The Court considers these three criteria in turn.

First, the Plaintiffs must show that they suffered injury in fact. In a case such as this, where a plaintiff alleges that a defendant accorded unequal treatment to the plaintiff on the basis of race while the plaintiff competed for a government benefit, injury in fact is established by showing "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993). In other words, the Plaintiffs need not show that they would have been promoted but for the race-consciousness of the Department in order to demonstrate that they suffered concrete, particularized injury. They "need only demonstrate" that they were "able and ready to [compete] and that a discriminatory policy prevented [them] from doing so on an equal basis." *Id.; see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) ("Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a discriminatory classification prevent[s] the plaintiff from competing on an equal footing." (internal quotation marks omitted); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1279 (11th Cir. 2001) ("The Supreme Court's standing jurisprudence in this area unmistakably turns the focus away from . . . *result-oriented* analysis and toward a *process-oriented* analysis that asks whether the plaintiff has actually been *exposed* to unequal treatment.").

Here, the Plaintiffs took a civil service exam in good faith, aspiring to become sergeants. They indicated that they would accept the promotion if they were chosen. Am. Compl. Ex. A. By the objective measure of qualification for the job of sergeant, they were identical to the Black Officers. But they were not considered for promotion because they were not black. This is the heartland of cognizable injury in a discrimination case. The Plaintiffs were not allowed to compete on an equal footing with the Black Officers because of their race. This is a sufficiently concrete, particularized, and personal injury to satisfy the first criterion of constitutional standing.

The second criterion of constitutional standing, causation, follows easily once injury in fact is defined correctly in a discrimination case. Due to the Department's decision to select three officers who scored 84 for promotion because of their race, ten other officers who also scored 84 were denied the opportunity to compete on an equal, race-neutral footing. There can be no doubt that the Department's actions, as opposed to the actions of some intervening third party, caused the Plaintiffs' inability to compete on an equal basis with the Black Officers.

To satisfy the third requirement of standing, redressability, the Plaintiffs need not show that they would have been promoted in the absence of the alleged discrimination. Instead, a plaintiff need only show that it is likely, as opposed to speculative, that a favorable ruling will redress the plaintiff's injury. *Lujan*, 504 U.S. at 561. To hold that Plaintiffs must show that they would have been promoted in the absence of racial considerations would collapse the standing inquiry in discrimination cases into a

judgment on the merits of the case, and would require the plaintiff to demonstrate a winning case on the issues of causation and damages just to get through the courthouse doors. *See Wooden*, 247 F.3d at 1280. A contrary ruling would also eviscerate the Supreme Court's careful definition of injury in fact in discrimination cases, and replace it with a standard the Supreme Court has explicitly rejected. *Adarand*, 515 U.S. at 211; *City of Jacksonville*, 508 U.S. at 666. All the Plaintiffs need show at this point is that a favorable ruling -- a ruling that the City engaged in race-conscious decision making that is either not justified by a compelling interest or not narrowly tailored to achieve that interest -- would redress their legal injury. If the Court were so to rule, the Plaintiffs would be allowed to compete in future rounds of promotions on an equal footing with other officers without regard to race. The Plaintiffs' injury, properly understood, is thus redressable by a favorable ruling on the merits.

The City relies principally on two cases, one from the Supreme Court, one from the District of Massachusetts, for the proposition that the Plaintiffs must show that they would have been promoted in the absence of improper consideration of race by the City in order to have standing to proceed. In *Texas v. Lesage*, 528 U.S. 18, 145 L. Ed. 2d 347, 120 S. Ct. 467 (1999) (per curiam), the Supreme Court held that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Id.* at 20-21. In *Lesage*, the Supreme Court granted summary judgment to the University of Texas against an unsuccessful applicant to the University's graduate school of education who sought damages based on the University's

consideration of race in admitting and rejecting applicants. The University admitted that it considered race in making admissions decisions, but argued that Lesage, who ranked below 73 of the 223 applicants for 20 spots in terms of grades and GRE scores, would not have been admitted even if the University had been barred from considering race. *Id.* at 19.

Lesage is not instructive on the issue of standing, but instead addresses how a defendant in a discrimination case may defeat liability *on the merits* even though the plaintiff has shown that the defendant impermissibly considered race in making the challenged decision. The Supreme Court did not mention standing specifically in *Lesage*. Instead, the Supreme Court referenced *Mount Healthy, City Board of Education v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), a case in which the Supreme Court held that a defendant may defeat liability on the merits for a constitutional violation (in that case, terminating the plaintiff for engaging in protected speech) by showing by a preponderance of the evidence that the same decision would have been made in the absence of the constitutional violation, *id.* at 285-87. *Lesage*, 528 U.S. at 20-21. *Mount Healthy* addresses the issue of causation in constitutional tort cases. It permits the defendant to show that legitimate as opposed to impermissible factors were the principal cause of the plaintiff's harm. *Mount Healthy*, and accordingly *Lesage*, do not address the question whether the Plaintiffs have made the threshold showing that they may bring a suit in the first instance. *See Saunders v. White*, 191 F. Supp. 2d 95, 2002 U.S. Dist. LEXIS 3573, 2002 WL 338744, at *12 n.21 (D.D.C. 2002) (observing several problems with the approach of other courts to equate *Lesage* with standing, specifically that *Lesage* does not mention standing explicitly and that such

an approach "unnecessarily conflates the standing inquiry with the actual merits the plaintiff's claim"). *But see Wooden*, 247 F.3d at 1277 (suggesting that, in spite of the absence of reference to standing in *Lesage*, the decision "plainly bears on that [kind of] inquiry"); *Boston's Children First v. Boston Sch. Comm.*, 183 F. Supp. 2d 382, 393 (D. Mass. 2002) (Stearns, J.) ("If the result would have been the same, regardless of the plaintiff's race . . . the plaintiff . . . would lack standing."). The Court therefore rejects the argument that *Lesage* compels a denial of *standing* to a plaintiff who cannot conclusively show that, absent the impermissible government action, he or she would have received the government benefit sought.

The City also relies upon *Donahue v. City of Boston*, 183 F. Supp. 2d 202 (D. Mass. 2001) (Tauro, J.), a case in which the court dismissed on standing grounds a claim of reverse discrimination brought by a white applicant to become an officer of the Boston Police Department, based on the fact that during one round of hiring, "the Department would have had to consider 586 applicants ahead of Donahue for thirteen spots," while during a second round of hiring "the Department would have had to consider 117 candidates for . . . seven spots before it reached Donahue." *Id.* at 209.

Donahue is distinguishable from the facts of this case. In *Donahue*, the court denied standing to a competitor for a government benefit, even though the defendant admitted that it took account of race in making its decisions, because the plaintiff "was eliminated from possible appointment before race . . . was a factor." *Id.* at 208-09. In other words, Donahue was not denied the opportunity to compete on an equal footing with those of all races. He simply was

eliminated from the competition before the competition became unequal. He thus did not suffer the kind of injury that discrimination lawsuits are designed to redress.

Donahue resembles *Wooden* insofar as Wooden denied standing to one plaintiff who challenged the University of Georgia's admittedly race-conscious admissions policy because that particular plaintiff was denied admission solely on the basis of grades and test scores, before the plaintiff even reached the stage of admissions decisions where race was taken into account, *Wooden*, 247 F.3d at 1281-83. *See Donahue*, 183 F. Supp. 2d at 208-09 (likening Donahue's circumstances to those of the Davis plaintiff in *Wooden*). *Donahue* also resembles a recent Sixth Circuit decision, *Aiken v. Hackett*, 281 F.3d 516, 2002 U.S. App. LEXIS 2522, 2002 WL 232931 (6th Cir. 2002), where that court ruled that plaintiffs, who were not among a group of white police officers who were "bumped" in order to promote black officers out of rank order to sergeant, lacked standing to litigate an antidiscrimination case. In *Aiken*, the court stated that it was "beyond debate" that the plaintiffs would not have been promoted to sergeant in the absence of an affirmative action program, because the plaintiffs' "composite scores (not the City's affirmative action program) kept them from being promoted." 2002 U.S. App. LEXIS 2522, [WL] at *3.

These cases -- *Donahue, Wooden*, and *Aiken* -- do not resemble this case. The plaintiffs in those cases were so clearly out of the running for the government benefits they sought that race never became an issue in their competition. Here, the Plaintiffs were on the cusp of being promoted to sergeant. They obtained the exact same score on the 1996 exam that the Black Officers obtained. Had the Department

been forced to proceed in a strictly race-neutral fashion, it is possible that the Department, in pursuit of more promotions of black officers to sergeant, would have promoted all the candidates who scored 84 on the 1996 exam, including the Plaintiffs. This is especially so given the fact that the Department informed the original 30 officers who were promoted of their promotions *before* explaining its departure from strict rank order to the Division and readjusting its promotion plan in response to the Division's objections. *See* Evans Aff. ¶ 8. Rather than rescind offers of promotion it made to some of those officers upon learning of the Division's objection to the Department's promotion decisions, the Department simply requisitioned more sergeant positions. *Id.*; Callahan Aff. ¶ 15. It is thus possible that, had the Department been forced to ignore race altogether, it would have requisitioned enough sergeant positions to promote everyone who scored 84 or better, in order to maintain the promotion status of the Black Officers, but in a completely race-neutral fashion. This would have allowed the Department to promote four black officers to sergeant, rather than just one, even if it meant promoting an additional 10 non-black police officers to sergeant. And, of course, this would have led to the promotion of the Plaintiffs.

For these reasons, the Court is satisfied that the Plaintiffs have made the requisite showing under *Lujan* that they have standing to litigate this case.

2. Standing to Seek Injunctive Relief

MAMLEO asserts that Plaintiffs lack standing to seek injunctive relief. Relying upon *City of Los Angeles v. Lyons*, 461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983),

MAMLEO argues that the Plaintiffs have made no showing that they will be affected by the allegedly unlawful conduct of the City in the future, as is required for a plaintiff to have standing to seek injunctive relief. MAMLEO's Mem. at 20 [Docket No. 108].

In order to have standing to seek injunctive relief, a plaintiff must not only satisfy the requirements of standing outlined in *Lujan*, but must also establish a "real and immediate threat" that the alleged wrongful conduct will be perpetrated by the defendant against the plaintiff again in the future. *Lyons*, 461 U.S. at 105; *see also Blake v. Southcoast Health Sys., Inc.*, 145 F. Supp. 2d 126, 132-34 (D. Mass. 2001) (applying *Lyons*). In *Lyons*, the plaintiff was injured after being placed in a control choke hold by members of the Los Angeles Police Department during a routine traffic stop. The plaintiff sought injunctive relief against further use of the choke hold by the Department except in cases where the target of the choke hold threatened immediate use of deadly force. The Supreme Court held that the plaintiff lacked standing to seek injunctive relief, explaining that in order to have such standing the plaintiff

> would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such a manner.

Id., 461 U.S. at 105-06. Because the plaintiff failed to make such a showing, the Supreme Court denied standing to the plaintiff to seek injunctive relief.

In this case, however, the Plaintiffs make out the requisite showing to seek an injunction against future consideration of race by the Department in making promotions. The Plaintiffs' counsel represents that the Plaintiffs have taken and will continue to take future civil service exams in pursuit of promotion to sergeant. Pls.' Opp'n to City's Mem. at 5 [Docket No. 111]. In continuing to seek promotion to sergeant, the Plaintiffs may be exposed to the same of kind of deliberate decision on the part of the Department to treat candidates differently because of their race. To be sure, the City states that all promotions since the ones at issue here have proceeded in strict rank order. Evans Aff. ¶ 13. But this is no guarantee that future promotion decisions, particularly those where the candidates have identical exam scores, will not be made on the basis of race. Police Commissioner Paul F. Evans stated during a deposition that he alone makes determinations regarding what percentage of minority officers at all ranks represents meaningful diversity on the force. Freidel Aff. Ex. 2, at 82-83 (Deposition of Paul F. Evans, day two) [Docket No. 142]. He also stated that he believes he has complete discretion to choose among candidates for promotion with identical scores on the exam. *Id.* at 84. Given this state of affairs, it is reasonable to expect that in the future the Plaintiffs might obtain a score on a promotion exam identical to candidates of other races, and yet be denied promotion while candidates of other races are promoted. The Commissioner has stated that it is his prerogative to exercise what he believes to be lawful discretion vested in him to achieve what he decides is an appropriate racial balance

within the sergeant ranks. At the very least, it may be said that the Plaintiffs will take the test again in the future and may participate in a competition in which they are not on an equal footing with candidates of other races. In short, they face the kind of real and immediate threat of injury that antidiscrimination law is designed to redress. They thus may pursue equitable as well as legal relief.

B. Permissibility of the Promotions Under Strict Scrutiny

The parties are in agreement that the City's actions in making promotions on the basis of race are subject to strict scrutiny. *Adarand*, 515 U.S. at 227; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989). This is true regardless of the race of the party singled out by the classification, and regardless of whether the race singled out is burdened or benefitted by the classification. *Croson*, 488 U.S. at 494 ("The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."). Once government action is subject to strict scrutiny, it is incumbent upon the government to demonstrate that the action is supported by a compelling government interest, and that the action is narrowly tailored to further the compelling interest. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986). This burden upon the government, however, is "merely one of production." *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1010 (D. Mass. 1996) (Garrity, J.). At all times, the burden of persuasion rests upon the Plaintiffs to show that the promotion decisions were unconstitutional. *Wygant*, 476 U.S. at 277-78, *id.* at 292-93 (O'Connor, J., concurring).

1. Compelling Interests

The City and MAMLEO proffer three interests they claim are compelling that were furthered by the promotion decisions at issue in this case. First, the City argues that the promotion decisions helped to effectuate the "operational needs" of the Department by ensuring a diverse police force, which is necessary in order to serve a community as diverse as Boston and which, according to the City, has been partly responsible for the precipitous drop in crime in Boston over the past decade. City's Mem. at 7-13. Second, the City and MAMLEO contend that the promotion decisions were necessary in order to remedy past discrimination within the Department. *Id.* at 17; MAMLEO's Mem. at 7-8. Finally, and related to the second justification, both the City and MAMLEO assert that the promotion decisions were required in order to stave off a lawsuit the City claims would have been brought by MAMLEO or disgruntled minority officers had the City promoted only one black officer out of a sergeant class of 30. City's Mem. at 17-18; MAMLEO' Mem. at 16-17.

Before examining each of these justifications individually to determine whether they are compelling, the Court offers a few general observations about compelling interests. The Supreme Court has offered little guidance on what constitutes such an interest. As the First Circuit observed in *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998):

> We know that [race-conscious] state action is acceptable upon a showing . . . that it is needed to undo the continuing legacy of an institution's past discrimination. We also know

> that the [Supreme] Court has rejected the "role model" theory as a compelling interest. Beyond these examples, the case law offers relatively little guidance.

Id. at 795 (citations omitted). To these guideposts may be added the principle that "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 909-10, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996). But that is all the help this Court has from above.

The Supreme Court has never held, however, that remedying past discrimination is the only interest that may be considered compelling, even though some justices have suggested as much, *e.g.*, *Croson*, 488 U.S. at 493 (O'Connor, J.) ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). The First Circuit, like other courts, has declined to hold that interests not linked to remedying past discrimination may never be compelling, in the absence of a directive from the Supreme Court to do so. *Wessmann*, 160 F.3d at 795-96; *see also Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) ("A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him."). As such, this Court will not reject categorically non-remedial justifications for the Department's race-conscious decision. Instead, the Court must examine the particular justifications submitted by the City and make a legal determination about whether they are compelling in light of

the unique circumstances of the Boston Police Department. *See Wessmann*, 160 F.3d at 798 (observing that when a court considers whether a particular interest asserted by the government is compelling, "the devil is in the details").

Additionally, in order for an interest proffered by a defendant to warrant consideration as a compelling interest, it must be an interest that actually motivated the defendant in making the decision at issue. As the Supreme Court stated in *Shaw v. Hunt*, a racial classification cannot withstand strict scrutiny based upon speculation about what may have motivated the decision maker. To be a compelling interest, the State must show that the alleged objective was the decision maker's *actual* purpose for the discriminatory classification. 517 U.S. at 908 n.4 (emphasis added) (internal quotation marks omitted). This requirement is consistent with the purpose of strict scrutiny, which is to "smoke out" the reasons why the government took the actions it did, in order to determine whether those reasons justify government consideration of race. *Croson*, 488 U.S. at 493; *cf. Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 & n.16, 744, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (rejecting defendant's proffered justification of remedying discrimination against women in the nursing industry as the "actual purpose" for the state's all-female nursing school, because evidence suggested that almost all nurses within the state were female, and thus females were not discriminated against in the nursing industry). A defendant may not submit a *post hoc* rationalization for its race-conscious action where it is clear that such a justification never crossed the decision maker's mind at the time the decision was made. *See United States v. Virginia*, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) ("The justification [for a government

classification] must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

Nevertheless, upon this record the Court rejects the Plaintiffs' suggestion that the only interest considered by the City at the time the promotions were made was the one articulated by the Department's Director of Human Resources, Edward P. Callahan, in a letter he sent to the Division explaining the Department's departure from strict rank order in promoting the Black Officers -- namely the desire to comply "with current EEOC guidelines, and with applicable federal and state discrimination laws," Am. Compl. Ex. B. *See* Pls.' Opp'n to City's Mem. at 8-10, 14-16 (arguing that this is the only interest that may be considered by the Court). When Commissioner Evans was asked at a deposition what his reasons were for promoting the Black Officers to the exclusion of the white officers with the same score on the 1996 exam, he replied, "adverse impact, a diversity at the higher ranks, and to help achieve community policing." Friedel Aff. Ex. 1, at 48 (Deposition of Paul F. Evans, day one).[7] Evans also stated in a signed report dated

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[7] In the same portion of the deposition, Commissioner Evans, when asked if the need to increase diversity at the sergeant level prompted him to make the promotions at issue here, replied, "Yeah, I probably believed that, but the major reasons was the adverse impact, to avoid adverse impact." Freidel Aff. Ex. 1, at 46. Evans also stated that his "major purpose in promoting them was to avoid adverse impact and to have [the 1996 exam] challenged. There may have been secondary issues of increasing diversity at that but they were not my major purpose in promoting." *Id.* at 47. The Plaintiffs suggest that these statements mean that diversity was not actually considered by the Department at the time

July 13, 2001, that when he made the promotions at issue, he did so "to avoid adverse impact under the EEOC Guidelines 'four-fifths rule,' . . . and to ensure that the Department had a sufficient number of minority sergeants to execute its mission of community policing." Evans Decl. Ex. A, at 3 [Docket No. 96]. In the Court's view, the Plaintiffs have failed to create a genuine dispute about that fact that the City did consider its operational needs prior to promoting the Black Officers, and the Court will therefore examine that justification for the City's action to determine whether it constitutes a compelling interest.

a. Operational Needs

The first interest articulated by the City as a justification for its consideration of race in promoting the Black Officers is an interest in sustaining the "operational needs" of the Department. More specifically, the City argues that meaningful minority representation within the Department, including at the sergeant level, helps to foster cooperation between police officers and members of the diverse communities they serve, and therefore allows the Department

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the decisions were made. Pls.' Opp'n to City's Mem. at 15. These statements do not impugn the City's claim that diversity was a consideration when the promotion decisions were made. The Commissioner's statement that he "probably" rather than unequivocally considered diversity does not mean that he did not consider such an interest, particularly in light of the remainder of his deposition testimony. And there is certainly no legal reason why a secondary, as opposed to a primary, motivation for taking race-based action may not be offered in defense of a race-conscious decision.

to protect and serve these communities more effectively. The Boston model of "community policing," in which the Department works with members of various communities to enhance crime prevention measures, offer young people alternatives to criminal activity, and protect communities against hardened criminals, would be in jeopardy, according to the Department, if it was forbidden to consider race in making promotion decisions, at least where the candidates are otherwise equally qualified. *E.g.*, Evans Decl. Ex. A, at 14. The Court explores the City's argument in greater detail below.

In 1990, crime in Boston reached an all-time high. The City faced a record 152 homicides, almost half of which were youth homicides. McDevitt Decl. Ex. A, at 7 (Expert Report of Jack McDevitt) [Docket No. 97]. Many of these homicides were concentrated in areas heavily populated by minorities, such as Roxbury, Dorchester, and Mattapan. *Id.* In response, the City implemented a number of measures designed to work with these and other communities, in order to bolster public trust in and cooperation with police officers who were patrolling those communities. These measures included giving more power to officers at the beat and precinct level in order to give them greater flexibility to address the unique concerns of their communities, *id.* at 9; assigning officers to particular beats or neighborhoods on a permanent basis, so that officers could get to know and develop a rapport with members of that community, *id.* at 10; and creating a system of "collaboration among neighborhood residents, community, patrol officers, supervisors, members of the business community, clergy, service providers, academic institutions as well as state and federal law enforcement officials," *id.*

The results have been phenomenal. The homicide rate in Boston dropped from 152 in 1990 to 31 in 1999, *id.* at 12, its lowest level since 1961, Evans Decl. Ex. A, tab C, at 1 (City of Boston, *1999 Crime Summary Report*) [Docket No. 96]. Overall serious crime in Boston has been reduced by 48% since 1990. Id. Citizen complaints against Boston police officers decreased by 55 percent from 1993 to 1997. McDevitt Decl. Ex. A, at 15. To be sure, some of the decrease in crime and in complaints against police officers is no doubt due to other factors, such as the national economic boom experienced during this time. But the community policing model, which focuses on getting the entire community involved in preventing and fighting crime, deserves at least some of the credit for these numbers.

Police Commissioner Evans insists that the success of community policing depends on the ability of the Department to garner the trust of the citizens it serves. Evans Decl. Ex. A, at 5 (Report of Paul F. Evans); *see also* McDevitt Decl. Ex. A, at 6. In Commissioner Evans's opinion, "[a] critical component of developing trust, cooperation, and respect is ensuring diversity among the ranks of the Department." Evans Decl. Ex. A, at 5. This is due to the fact that "when members of the community [can] see themselves among the ranking police officers, they begin to be willing to work with us, rather than against us." *Id.* at 13. The Department depends on citizens to provide them with information about criminal activity within their neighborhood, assist in identifying offenders, and testify in court to convict these offenders, as well as to identify young persons who could benefit from services in order to be steered away from criminal activity. McDevitt Decl. Ex. A, at 13, 18, 24. Beyond helping to establish trust with a diverse community,

a diverse police force helps further the law enforcement goals of the Department. "For example, if there is an African American drug distribution network developing in a community, an African American officer, acting in an undercover capacity, is much more likely to be able to develop intelligence about the drug dealers involved than a white undercover officer could." *Id.* at 24.

The City argues that diversity is necessary to further its operational needs not only at the police officer level, but all the way up the ranks of the Department. "If [the Department] has a representative percentage of minority members but very few of those members have ever been promoted to a position of command or leadership the message sent back to the community is that the organization values diversity but only in certain roles, not in leadership positions." *Id.* at 25. Diversity at high levels of the Department may also be important to help mediate disputes between members of the community and officers on the beat, "particularly those that involve [minorities]." *Id.* at 26.

This Court understands the City's need to fight crime and maintain fruitful relationships with the communities served by the Department. The Court is also aware that some courts have been particularly receptive to diversity-based arguments in the law enforcement context. *E.g., Wessmann*, 160 F.3d at 795; *Wittmer*, 87 F.3d at 919 (collecting cases). Ultimately, however, the Court cannot accept the City's argument that

operational needs justify race-conscious decision making on the part of the Department for the indefinite future.[8]

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[8] The City, which has claimed its right to a jury trial from the inception of this litigation, argues that it has the right to a jury's determination of this issue.

Not so. What constitutes a compelling interest is matter of law. *See, e.g., Wygant*, 476 U.S. at 274-76 (rejecting, as matter of law, remedying societal discrimination and providing role models to young minorities as compelling justifications for race-conscious action); *Wessmann*, 160 F.3d at 795 ("Because the issues advanced in this appeal -- specifically, whether diversity and curing vestiges of past discrimination satisfy strict scrutiny -- raise either questions of law or questions about how the law applies to discerned facts, our review is essentially plenary."). True, the particular contours of a compelling state interest arise from a discrete factual context. Here, the Court has followed traditional summary judgment jurisprudence and drawn all reasonable inferences from the undisputed facts in *favor* of the City, ruling nevertheless that the City's proffer as to operational needs falls short.

Even had the proffer presented a closer question, however, it is important to note that this Court would nevertheless proceed itself to evaluate the situation and initially make the determination whether the operational needs of the Department constitute a compelling state interest. Such a determination involves a consideration of what are known as "legislative facts" -- those facts which themselves determine the legal rule, rather than "adjudicative facts" -- those facts which determine whether an established legal rule applies in a particular instance. *See* Fed. R. Evid. 201(a) advisory committee's note (distinguishing legislative from adjudicative facts). As such, this determination is one for the Court to make, not the jury. *Id.* ("In determining the content or applicability of a rule of domestic law, the judge is unrestricted in

The City's argument rests on the cynical assumption that members of a particular race will only cooperate with members of their own race. Commissioner Evans's report suggests that only when a sufficient number of minorities are on the police force will certain communities "be willing to work with us, rather than against us." Evans Decl. Ex. A, at 13. Such a policy invites the emergence of a divisive kind of racial politics between communities and the Department, as members of any race might threaten not to cooperate with the Department unless they see representation within the Department roughly proportional to that racial group's percentage of the population of Boston generally. *Cf. Wittmer*, 87 F.3d at 920 (rejecting contention that "prison authorities are entitled to yield to extortionate demands from prisoners for guards of their own race"). This kind of divisiveness, fostered by divvying up government benefits along racial lines, is what cases interpreting the Equal Protection seek to avoid. *E.g., Croson*, 488 U.S. at 493 (expressing concern that non-remedial racial classifications will "lead to a politics of racial hostility").

Additionally, the policy sends a message to officers within the Department that they are nothing more than a product of

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his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . The parties do no more than assist; they control no part of the process." (quoting Edmund M. Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270-71 (1944)). Such an approach, of course, carries with it the benefit of plenary review by higher courts. *Wessmann*, 160 F.3d at 795.

their race. It relies upon crude stereotypes about how members of the same race act around one another, and how they act around members of other races. It suggests that the valued unit of measurement in the Boston Police Department is the group, rather than the individual. These are impermissible considerations for a government body to entertain. *E.g., Miller v. Johnson*, 515 U.S. 900, 912, 132 L. Ed. 2d 762, 115 S. Ct. 2475 (1995) ("Race-based [decision making] embodies stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts--their very worth as citizens--according to a criterion barred to the Government by history and the Constitution.") (internal quotation marks omitted).

Finally, there is no logical stopping point to the Department's justification. Presumably, the Department will always have an interest in having a diverse police force to serve a diverse community. Therefore, there will always be an incentive for the Department to take account of race if such a justification is held to be compelling, to make sure that the racial makeup of the Department matches the racial makeup of the City. This is an unconstitutional end for a government policy. *E.g., Wittmer*, 87 F.3d at 920 (rejecting proposition that government "would have been entitled to take steps to make the racial composition of the security staff mirror that of the inmate population."). All the Department would have to show is that diversity within the Department continues to lead to police-community cooperation, and it would be given carte blanche to continue making race-based decisions. It would permit race-conscious remedies that are "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276. This justification thus offends the principle that, because remedies for equal

protection violations usually involve treating people unequally, such remedies should be limited in scope and in duration. *See Croson*, 488 U.S. at 498. Because the operational needs justification has no such built-in limitation, it could be used to justify race-conscious decision making indefinitely, which has in the past been the reason why other proffered interests have been rejected by the Supreme Court. *See Wygant*, 476 U.S. at 275-76 (rejecting the role model theory and societal discrimination as compelling interests for this reason).

For these reasons, the Court rejects the City's "operational needs" defense as a compelling justification for its admittedly race-conscious action.[9]

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[9] At a hearing on January 10, 2002, the Court suggested that another reason to reject the City's interest in effectuating its operational needs was a provision of the Massachusetts General Laws prohibiting unfair treatment within the state civil service on the basis of race. Mass. Gen. Laws ch. 31, § 1. The Court recognizes that if "operational needs" is a compelling interest in the constitutional sense, state law concerns would be irrelevant, as the Department's duty to comply with the federal Constitution would conflict with, and thus preempt, the state law obligation to assure fair treatment without regard to race. *See, e.g., Bowe v. Sec'y of the Commonwealth*, 320 Mass. 230, 245, 69 N.E.2d 115 (1946) ("When one party relies on some provision of a statute, and the other relies on some provision of the higher law of the Constitution, with which . . . the statute conflicts, . . . [the court's] duty is to apply the higher law of the Constitution, and disregard the statute."). Because the government has a clear duty to remedy vestiges of past discrimination, *Wygant*, 476 U.S. at 277, for example, such a duty overrides state law concerns regarding unfair treatment on the basis of race within the civil service.

b. Remedying Past Discrimination

The second interest proffered by the City and MAMLEO as a justification for the promotion decisions at issue is an interest in remedying current vestiges of past discrimination by the Department against black applicants and officers. City's Mem. at 14-17; MAMLEO's Mem. at 7-16. Well understanding that such an interest has been recognized by the Supreme Court as compelling under certain circumstances, *e.g.*, *Shaw v. Hunt*, 517 U.S. at 909; *Wygant*, 476 U.S. at 277, the City and MAMLEO amass evidence, all of it uncontested by Plaintiffs, to show that remaining vestiges of prior discrimination perpetrated by the Department against blacks justify the limited race-conscious action taken by the Department in this case. After setting out the contours of remedying past discrimination as a compelling interest, the Court considers the undisputed evidence.

In order for a government interest in remedying past discrimination to rise to the level of a compelling justification for race-conscious action, two conditions must be satisfied: "First, . . . States . . . must identify that [past] discrimination

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For the reasons outlined in this opinion, however, the Court rejects operational needs as a compelling interest on its own terms. Neither the Supreme Court nor the First Circuit has suggested that a government body has a constitutional mandate to further its own operational needs. In the absence of a clear directive from either of these courts to recognize such a mandate, it would be imprudent to create one out of whole cloth, particularly where it would contravene the clearly-articulated policy of the elected legislature of this Commonwealth to proscribe unfair treatment within the state civil service on the basis of race.

. . . with some specificity before they may use race-conscious relief. . . . Second, the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embarks on an affirmative-action program." *Shaw v. Hunt*, 517 U.S. at 909 (citations and internal quotation marks omitted).

With respect to the first condition, the Court is satisfied that the City and MAMLEO have identified the past discrimination to be remedied with the appropriate degree of specificity. They identify the relevant past discrimination as that committed by the Boston Police Department, rather than, for example, discrimination in Boston generally or in police departments nationally, which would not satisfy the City's burden of showing that it had a "strong basis in evidence" for taking the action it did.

As to the second condition, the Court is satisfied preliminarily that the City concluded race-based action was necessary *before* it made the promotion decision. The Plaintiffs argue that the City never considered this rationale at the time of the decision, and should thus be barred from submitting this rationale now. *E.g.*, Pls.' Opp'n to City's Mem at 6; Pls.' Mem. at 9 [Docket No. 124]. For the reasons set out in the Court's discussion of the City's operational needs argument, *see supra* pp. 32-34, the Court holds that the Department believed the challenged promotions were necessary to remedy past discrimination before it made the decisions. Even if the Court is wrong as matter of undisputed fact, however, as matter of law the City's interest in complying with EEOC guidelines and state and federal discrimination law, which it clearly articulated at the time it

made the promotion decisions, Am. Compl. Ex. B, permissibly implicates the City's interest in remedying past discrimination. In *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13 (1st Cir. 1998), the First Circuit rejected an argument identical to the one made here by the Plaintiffs. The court in Superior Officers dubbed "untenable" plaintiffs' argument that, because Commissioner Evans justified race-conscious action as necessary to comply with a consent decree then thought to be in force, he was not also acting to remedy past discrimination within the Department. 147 F.3d at 23. The First Circuit stated that "[compliance with the consent decree] so much implicates [remedying past discrimination] that Commissioner Evans, who stated in his affidavit that he was concerned with avoiding adverse impact on minority candidates, was undoubtedly pursuing both goals at once." *Id.*

The important question here is whether the Department had a "strong basis in evidence" for its belief that race-conscious action was necessary. *Shaw v. Hunt*, 517 U.S. at 909 (quoting *Wygant*, 476 U.S. at 277). Such a strong basis in evidence may be demonstrated by "either 'a contemporaneous or antecedent finding of past discrimination by a court or other competent body,' or evidence 'approaching a prima facie case of a constitutional or statutory violation.'" *Superior Officers*, 147 F.3d at 20 (quoting *Wygant*, 476 U.S. at 289, and *Croson*, 488 U.S. at 500). The City and MAMLEO rely on a combination of both, and submit that judicial determinations of discrimination by the Department in hiring and promoting blacks, combined with the adverse impact of the 1996 exam, establish the requisite strong basis in evidence to take race-based action to remedy such discrimination.

Before delving into the evidence submitted by the City and MAMLEO on this point, the Court resolves one more legal dispute. The Plaintiffs assert repeatedly that the City may not rely on "after-acquired" evidence to demonstrate the existence of past discrimination or adverse impact. *E.g.*, Pls.' Opp'n to MAMLEO's Mem. at 5 [Docket No. 113]; Pls.' Mem. at 4-5. To say that the particular interest articulated by the government must have been actually considered at the time the government made its decision, *see supra* pp. 31-32, is not to say that the government must have made findings that it actually discriminated prior to its decision to engage in race-conscious action. The former is a principle recognized by the Supreme Court; the latter is a principle expressly rejected by the Supreme Court. In Justice O'Connor's concurring opinion in *Wygant*, for example, she endorsed the holding of a plurality of the Court that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." 476 U.S. at 289 (O'Connor, J., concurring). The rationale for this principle is simple: if the government was required to develop statistical or other detailed evidence that it engaged in discrimination against blacks, for example, before it engaged in affirmative action designed to enhance opportunities previously denied to blacks, there would be no incentive for the government to take affirmative action, because to do so would require the government to expose itself to liability to the very individuals it is trying to help. *Id.* at 290. This principle recognizes the delicate position of public employers, who are "trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken." *Id.* at 291.

Somewhere, then, between merely articulating an interest in remedying past discrimination and garnering enough evidence to make out a winning case of discrimination against itself, the government satisfies its burden of demonstrating that it had a "strong basis in evidence" for concluding that past discrimination warranted a race-based remedy. Once again, Justice O'Connor provides useful guidance for where exactly that somewhere might be in a case like this:

> Demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

Id. at 292.

In making this showing, the government may rely on statistical or other evidence developed after it engaged in race-conscious action to bolster its claim that vestiges of past discrimination remained within the government body. *E.g., Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 911-13 (11th Cir. 1997); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 91 F.3d 586, 605 n.21 (3d Cir. 1996); *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1520-21 (10th Cir. 1994); *Harrison & Burrowes Bridge Constructors, Inc. v.*

Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919-20 (9th Cir. 1991). In this case, as long as the Department had the requisite "strong basis in evidence" for believing that the promotion decision was necessary to remedy present vestiges of past discrimination within the Department, it may rely on evidence developed after the promotion was made to buttress such a claim during litigation. *Rothe Dev. Corp. v. United States Dep't of Defense*, 262 F.3d 1306, 1328 n.21 (Fed. Cir. 2001). With these legal principles in mind, the Court turns to the evidence of past discrimination within the Department.

The Court begins by taking notice of the many opinions of the First Circuit documenting the discrimination perpetrated in the past by the Boston Police Department against minorities.[10] Particularly instructive is the First Circuit's most recent examination of the state of affairs within the Department in *Boston Superior Officers Federation v. City of Boston*, 147 F.3d 13 (1st Cir. 1998). In *Superior Officers*, the First Circuit held that the Boston Police Department's decision to promote a black officer named Rafael Ruiz to the rank of lieutenant, even though Ruiz scored one point lower on a civil service exam than did three white officers who were not promoted, was justified by an interest in remedying past

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[10] A federal district court may take judicial notices of adjudicative facts "at any stage" of litigation, in its own discretion, where the facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. The facts to be noticed are contained within the pages of the *Federal Reporter*, and their accuracy cannot reasonably be questioned. Should the Plaintiffs choose to challenge the Court's exercise of discretion in this regard, however, they may do so. *Id.*

discrimination within the Department. In so holding, the court noted:

> The Department's history of racial discrimination is well-documented in the decisions of this court. In 1972, we affirmed a district court's finding that the BPD discriminated against black applicants through the use of entry-level testing procedures that favored whites. *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). As we noted in *Castro*, that discrimination resulted in a gross racial disparity among the Department's ranks: in 1970, only two percent of [Department] officers were black or Latino; by comparison, these groups constituted 16 percent of the general population.
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> Nineteen years after *Castro*, this court in *Stuart [v. Roache*, 951 F.2d 446 (1st Cir. 1991) again considered the evidence of past racial discrimination within the [Department] . . . and saw little evidence of remedying the discrimination cited in *Castro*. . . . 'Remedial action takes time,' we reasoned, 'and discrimination may linger for many years in an organization that had excluded blacks from its ranks.'
>
> The same logic dictates that the Department's historic discrimination negatively affected the number of black lieutenants at the time of Ruiz's promotion.

Id., 147 F.3d at 20 (some citations omitted).

The Plaintiffs dispute the precedential force of *Superior Officers*, arguing that the case stands for the proposition that the Department is barred from relying upon its history of past discrimination to justify post-*Superior Officers* race-conscious promotions. *E.g.*, Pls.' Opp'n to City's Mem. at 12-13, 15; Pls' Opp'n to MAMLEO's Mem. at 4-5. The Plaintiffs rely on the court's statement in *Superior Officers* that its holding "is based strictly on the[] unique circumstances [of this case], and does not give the [Department] license to depart from strict rank order in future promotions." 147 F.3d at 25.

The Plaintiffs attempt to wring more from the words of *Superior Officers* than they will bear. To be sure, the First Circuit did suggest that the Department may not rely on its discriminatory past to justify affirmative action indefinitely. But to say that *Superior Officers* does not give the Department license to depart from strict rank order in the future does not mean that the case prohibits the Department from ever considering race in the future. In fact, as to the question whether the Department may depart from strict rank order in future rounds of promotions, the court in *Superior Officers* explicitly reserved judgment. *Id.* at 25 ("Whether any similar factors are left that might warrant future remedial action is a question that we need not now address.").

Superior Officers is useful principally for its documentation of the past discriminatory history of the Department, which the First Circuit held was not "too temporally remote" to constitute part of the Department's evidentiary basis for concluding that race-conscious action was needed, *id.* at 20. The questions whether the Department

had a strong basis in evidence for concluding that *present vestiges* of past discrimination remain that required a race-conscious remedy, and whether the Department's remedy was *narrowly tailored* to the interest asserted, are questions that the Department must answer anew in this case, and must answer anew in every case, to ensure that the Department refrains from using race in an open-ended way indefinitely.

The Court now turns to the evidence presented by the City and MAMLEO that current vestiges of past discrimination existed in the 1996 exam that warranted a race-based solution. It is undisputed in this case that, had the Department promoted only 30 officers in strict rank order, 29 white officers and one black officer would have been promoted. Callahan Aff. ¶¶ 9, 11. Based on the number of black and non-black officers who passed the 1996 exam -- 33 and 192, respectively -- the Department calculated at the time it made the promotion decisions that promoting 30 officers in strict rank order would yield a black/non-black selection percentage ratio of 20%. *Id.* ¶ 11 & Ex. B. According to the EEOC Guidelines "four-fifths" rule, a selection percentage ratio below 80%, or four-fifths is evidence of adverse impact.[11]

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[11] The Plaintiffs assert that the First Circuit in *Superior Officers* held that, because the consent decree between the Department and MAMLEO which required compliance with the four-fifths had expired, the four-fifths rule is no longer relevant to the determination of past discrimination. Pls.' Opp'n to MAMLEO's Mem. at 6-7. To the contrary, the First Circuit, despite holding that the Department was no longer bound by the consent decree, observed that although violation of the four-fifths rule, "standing alone, is not conclusive evidence of discrimination . . . [the rule] can . . . properly serve 'as a benchmark against

The Department had evidence, based on calculations it performed at the time it made the promotion decisions, Callahan Aff. ¶ 11, that proceeding in strict rank order would have produced a black/non-black selection ratio that fell well

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which . . . to gauge [the City's] efforts to remedy past discrimination.'" *Superior Officers*, 147 F.3d at 21 (quoting *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421, 478, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986)); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (stating that EEOC Guidelines, as this administrative interpretation of Title VII by the EEOC, are entitled to "great deference").

There are instances, particularly where the sample size is small, where use of the four-fifths rule is inappropriate. *Fudge v. City of Providence Fire Dep't*, 766 F.2d 650, 658 n.10 (1st Cir. 1985). This concern obtains only when the sample size is so small that a change in a single promotion decision -- i.e., the decision to promote one more black officer and one fewer white officer -- makes the difference between adverse impact and no adverse impact under the four-fifths rule. *Superior Officers*, 147 F.3d at 22 (distinguishing *Fudge*). In this case, as in *Superior Officers*, the sample size is sufficiently large that the four-fifths rule may serve as an appropriate benchmark against which to gauge adverse impact. *See* Rutkowski Aff. Ex. 14 P 25 (Expert Report of James Medoff) (calculating that a single promotion change would not have made the difference between adverse impact and no adverse impact under the rule); Callahan Aff. Ex. B (same).

Because this is not a case in which the sample size is too small to make four-fifths rule calculations unreliable, the Court looks to the rule in the same way the First Circuit did in *Superior Officers*: as a helpful but not dispositive benchmark for determining adverse impact.

below the 80% ratio required to avoid an inference of adverse impact.

This gross statistical disparity between the selection percentage of black officers and the selection percentage of white officers, coupled with the documented history of past discrimination within the Department, created an adequate foundation for the Department to conclude that a departure from strict rank order was necessary. *See Superior Officers*, 147 F.3d at 21 (stating that a violation of the four-fifths rule along with statistical evidence of underrepresentation of blacks at the lieutenant level, "reinforces the [Department's] conclusion that it had not yet succeeded in remedying the effects of its history of discrimination"). While this evidence might not alone have amounted to a winning Title VII case against the City by MAMLEO or minority officers, it would have presented enough evidence to make the prospect of losing a worthwhile concern for the City.[12]

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[12] It is necessary at this point to explain why the violation of the four-fifths rule results in a potentially meritorious Title VII claim. Under Title VII, an employment selection procedure that adversely affects minorities can lead to employer liability if it can be shown that an alternative selection procedure existed that yielded qualified applicants while resulting in less adverse impact on minorities. 42 U.S.C. § 2000e-2(k); *Albermarle Paper Co. v. Moody*, 422 U.S. at 431, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975) ("Discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.") (internal quotation marks omitted).

A prima facie Title VII adverse impact claim against an employer may be demonstrated in a number of ways. The Supreme Court has stated that a showing of "gross statistical disparities" between selection of minorities and non-minorities may alone indicate adverse impact. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977). A violation of the four-fifths rule, even though it is generally considered a "rule of thumb," may demonstrate adverse impact, particularly when coupled with other statistical evidence of adverse impact. *See generally Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988) (outlining ways in which adverse impact may be demonstrated, and declining to adopt any particular method as authoritative, approving instead of courts' case-by-case approach to determining adverse impact).

Once adverse impact is established, the burden of production shifts to the employer to show that the test has a "manifest relationship to the employment in question." *Albermarle Paper*, 422 U.S. at 425 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1977)). This includes a showing not only that the test validly distinguishes *between* passing and failing scores in terms of applicants' qualifications for the job in question, but also *among* passing scores, if the test is to be coupled with strict rank-order selection from the list of passing scores. *E.g., Guardians Ass'n v. Civil Serv. Comm'n*, 630 F.2d 79, 100-01 (2d Cir. 1980) ("Permissible use of rank-ordering requires a demonstration of such substantial test validity that it is reasonable to expect one-or two-point differences in scores to reflect differences in job performance."). Because the 1996 exam was never content-validated, the City could not show, at least as the evidence currently stands, that the 1996 exam validly distinguished between passing and failing scores, much less among passing scores. Thus, had the City proceeded in rank order and been sued

by MAMLEO or minority officers, it is quite possible that the City would have failed to meet its burden of production at this stage of the case, and would have thus been found to have violated Title VII.

Even if the City succeeded in showing that the test bore a close relationship to the skills sought in prospective sergeants, the would-be plaintiffs could still prevail by showing that other selection methods which have less adverse impact on minorities nonetheless meet the employer's objective of obtaining a qualified workforce. *E.g., Albermarle Paper*, 422 U.S. at 425. In such a case, the employer's failure to adopt the equally valid selection method that resulted in less adverse impact on minorities would be evidence that the employer's articulated reasons for relying upon the test are a pretext for discrimination. *Id.*

In this case, MAMLEO asserts that it has in the past recommended "banding" of test results -- i.e., treating scores within a given range (such as 84 to 86) as functionally equivalent for purposes of selecting among candidates -- as an equally valid method of selecting among candidates that has less adverse impact on minorities. MAMLEO's Mem. at 14. Banding has been approved by a number of courts. *E.g., Superior Officers*, 147 F.3d at 24 n.5; *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 723-24 (9th Cir. 1992); *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140, 1144 (2d Cir. 1991). Had the Department rejected such a proposal after it was found to reduce adverse impact while still yielding qualified candidates for promotion, the Department would have faced a very real prospect of liability under Title VII for using an employment practice that adversely impacted minorities.

Therefore, when the Department learned that its proposed promotion scheme of hiring 30 officers in strict rank order resulted

This evidence therefore constituted an adequate starting point for the Department to conclude, at the time it made the promotion decisions, that current vestiges of past discrimination remained and warranted remedial action.

But this is not the only evidence upon which the City and MAMLEO rely. In addition to a violation of the four-fifths rule, MAMLEO submits the expert reports of Dr. Kathleen K. Lundquist, an industrial psychologist who studied the adverse impact of the 1996 exam in preparation for this litigation. Her reports show that the 1996 exam adversely impacted blacks vis-a-vis non-blacks, and that the difference between the black selection percentage and the non-black selection percentage is statistically significant under two different measures of statistical significance -- "chi-square" and "Fisher's Exact Test".[13] Rutkowski Aff. Ex. 15 ¶¶ 9-14

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in a black/non-black selection percentage ratio of 20%, well below the 80% rule of thumb set by the four-fifths rule, it had a sufficient evidentiary basis, in light of the Department's past discrimination against blacks, to take remedial action.

[13] A "chi-square" statistic indicates as a percentage the likelihood that the difference between two measures -- in this case, between the selection percentages of blacks and non-blacks -- is attributable to chance. A chi-square statistic of less than five percent is considered to indicate statistical significance, or that the difference between the two measures is attributable to something other than chance. A "Fisher's Exact Test" value expresses differences between two measures in terms of standard deviation units. A Fisher's Exact Test value of 2.00 or greater is generally considered to indicate statistical significance. Rutkowski Aff. Ex. 15 ¶ 8. Under both of these tests, the adverse impact of the 1996 exam on blacks vis-a-vis non-blacks was found to be highly

& tabs 1-3 (Expert Report of Kathleen K. Lundquist). Rutkowski Supp. Aff. Ex. A ¶¶ 10, 13-14 (Supplemental Expert Report of Kathleen K. Lundquist) [Docket No. 133]. These calculations bolster the inference raised by violation of the four-fifths rule that the 1996 exam adversely impacted black officers.

The City also submits the report of Dr. James Medoff, a professor of labor economics at Harvard University. Dr. Medoff reports on the state of black representation at the rank of sergeant relative to black representation at the officer level. He states that, as of October 1996, 25.02% of the 1547 police officers within the Department were black, but only 16.49% of the 285 sergeants were black. Rutkowski Aff. Ex. 14 ¶ 14 & tbl.1 (Expert Report of James Medoff). This difference is statistically significant using a chi-square statistic. *Id.* The gap diminishes, but remains, when officers not eligible for promotion by virtue of not having served long enough on the force are excluded from the calculation. *Id.* ¶ 15 & tbl.2. The court in *Superior Officers* found similar evidence relevant to the question whether the Department had remedied past discrimination adequately, and held that the paucity of black officers at the lieutenant level reinforced the Department's evidentiary foundation for its race-conscious action. 147 F.3d at 21.

The Court is therefore satisfied from this undisputed evidence that the City has satisfied its burden of showing that the Department had a "strong basis in evidence" for taking remedial action. *See Wygant*, 476 U.S. at 292 (O'Connor, J.,

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statistically significant. *Id.*

concurring) (suggesting that "demonstrable evidence of a disparity" between the percentage of minorities in a government position and the percentage of qualified minorities in the relevant labor pool "sufficient to support a prima facie Title VII pattern or practice claim" by minorities would constitute a strong basis in evidence for remedial action); *cf. Shaw v. Hunt*, 517 U.S. at 908 n.4 (assuming that a state has a compelling interest in complying with the Voting Rights Act, but only when the government has a "strong basis in evidence for believing that it is violating the Act") (citations omitted). The Court holds that, in this case, the City's interest in remedying past discrimination is supported by a sufficiently substantial evidentiary basis that it rises to the level of a compelling state interest.

c. Avoiding Litigation

The third justification submitted in support of the Department's promotion decisions is the Department's interest in avoiding litigation that it asserts would have followed inexorably from its failure to promote more than one black officer to the rank of sergeant. City's Mem. at 17-18; Evans Aff. ¶¶ 6, 10-11. In support of its argument, the City relies upon *Superior Officers*, where the First Circuit stated that the motivation of "heading off a potential discrimination claim--would be [a] lawful" justification for race-conscious action. 147 F.3d at 23.

To say that the desire to avoid litigation is a *lawful* objective does not necessarily make it a *compelling* objective in the constitutional sense. The cases upon which the First Circuit in *Superior* Officers and the City rely involve Title VII claims brought by disgruntled employees as a result of an

employer's decision to promote a member of another race or gender in order to fulfill a pre-existing settlement agreement or consent decree between the employer and the promoted individual. *Marcantel v. La. Dep't of Transp. & Dev.*, 37 F.3d 197, 198 (5th Cir. 1994); *Carey v. United States Postal Serv.*, 812 F.2d 621, 622-23 (10th Cir. 1987); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1234-35 (6th Cir. 1980). These cases stand only for the proposition that when an employer hires or promotes an individual on the basis of race or gender in order to fulfill a pre-existing settlement agreement or consent decree with that individual, the employment decision does not constitute unlawful discrimination against others who were not a part of the settlement agreement or consent decree. *Mercantel*, 37 F.3d at 201; *Carey*, 812 F.2d at 624; *McCall Printing*, 633 F.2d at 1237.

Here, there was no consent decree in force between the Department and the Black Officers that required them to be promoted to sergeant at the next available opportunity. The interest articulated by the City in this case is much more ephemeral: it is a belief that, even though no consent decree existed between the Department and MAMLEO or the Black Officers, there was the prospect of a Title VII suit brought by one of these parties had the Department promoted in strict rank order.

The general assertion of an interest in avoiding litigation, without more, "sweeps too broadly" to be a compelling state interest in all circumstances. *Shaw v. Hunt*, 517 U.S. at 908 n.4. Certainly there cannot be a compelling state interest in "avoiding meritless lawsuits." *Id.; see also id.* at 943 n.18 (Stevens, J., dissenting) ("The majority is surely correct in

stating that the threat of a lawsuit, however unlikely to succeed, does not constitute a compelling interest . . . ."). Thus, this Court does not read the language of the First Circuit in *Superior Officers* to mean that a conclusory assertion by a defendant that failing to act in a race-based way would have invited litigation suffices to establish a compelling interest.

Instead, the proper way to analyze an articulated interest in averting a lawsuit under strict scrutiny is the same as an articulated interest in remedying past discrimination: the interest is compelling only if a defendant has a "strong basis in evidence" for believing it violated the relevant law that would have brought about the feared lawsuit. *Shaw v. Hunt*, 517 U.S. at 908 n.4. In this case, only if the Department had a strong basis in evidence for believing it violated Title VII would the City's interest in avoiding a lawsuit predicated on a violation of Title VII rise to the level of a compelling interest.

The analysis here is thus entirely duplicative of the Court's consideration of the City's interest in remedying past discrimination, *see supra* Part IV.B.1.b & note 12, and the Court will not repeat it. Although the City cannot get by with a bald assertion that a lawsuit would have followed from proceeding in strict rank order, together with MAMLEO it has shown here that a meritorious Title VII action was likely given the solid evidence of the disparate impact of the 1996 exam, the history of discrimination within the Department, and the close watch kept by MAMLEO over all hiring and promotion decisions made by the Department. The Court holds this interest to be compelling based on the undisputed facts of this case.

2. Narrow Tailoring

The City and MAMLEO assert that the promotion decisions at issue were narrowly tailored -- as they must be under a strict scrutiny analysis -- to further the compelling interests set out above. The Plaintiffs, not surprisingly, contest this conclusion. Pls.' Opp'n to City's Mem. at 17-19; Pls.' Opp'n to MAMLEO's Mem. at 9-10. It is for this Court to determine, by applying the law to the undisputed facts as presented by the parties, whether the Department's promotion decisions were narrowly tailored. *See, e.g., United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 219 n.12 (2d Cir. 2001) ("A district court's determination that a race-conscious remedy is narrowly tailored to advance a compelling government interest involves an application of law to facts . . . ."); *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d at 905 (11th Cir. 1997) ("After identifying the factual predicate for the affirmative action program in question, the district court makes a legal determination about whether the program's terms are sufficiently tied to its legitimate goals to pass constitutional muster."). Before addressing the dispute between the parties, the Court maps out the legal landscape upon which narrow tailoring battles are fought.

The Supreme Court and the First Circuit have provided several criteria to direct lower courts in evaluating race-conscious policies. The Supreme Court has stated that factors to be considered include "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief . . . and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987) (plurality opinion).

The First Circuit provided further guidance in *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992), where it stated that relevant narrow tailoring factors include:

> The extent to which (i) the beneficiaries of the order are specially advantaged, (ii) the legitimate expectancies of others are frustrated or encumbered, (iii) the order interferes with other valid state or local policies, and (iv) the order contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration.

Id. at 1278; see also *Superior Officers*, 147 F.3d at 23-25 (applying *Mackin* factors and holding that promotion of one Hispanic officer to the rank of lieutenant out of rank order was narrowly tailored to remedying past discrimination committed by the Department). The Court analyzes the Department's promotion decisions using these factors.

The first consideration under narrow tailoring is "the necessity for the relief and the efficacy of race-neutral alternatives." *Paradise*, 480 U.S. at 171. It is clear in this case that *some* kind of relief was necessary, in light of the fact that promoting 30 officers in strict rank order as the Department originally planned would have adversely impacted black officers and exposed the Department to suit from those officers or from MAMLEO, which closely reviewed the Department's actions. *See supra* Part IV.B.1.b & note 12; Callahan Aff. ¶¶ 9-11; Evans Aff. ¶¶ 4-11. The Department's response was to promote only enough black officers to bring it into compliance with the four-fifths rule and avoid an inference of adverse impact. *See* Callahan Aff. Ex. B

(comparing black/non-black selection percentage ratios for four different promotion arrangements). According to Dr. Kathleen Lundquist, the approach taken by the Department represented the alternative that had the least adverse impact on white officers, with the exception of an approach proposed by the Department that was rejected by the Division. Rutkowski Aff. Ex. 15 ¶¶ 13-14 & tab 3. This undisputed evidence suggests that the Department did what was necessary, and no more, to correct the adverse impact of the 1996 exam.

As to the efficacy of race-neutral alternatives, this case is slightly different from *Superior Officers*, where there was "no suggestion that any race-neutral measure would have been adequate to remedy the Department's past discrimination." 147 F.3d at 25. Here, the Plaintiffs argue that at least two possibilities -- adding an oral interview component to a candidate's promotion score in order to mitigate the adverse impact of the 1996 exam, and adding an "assessment center"[14] component to a candidate's promotion score -- could have been implemented by the Department to avoid adverse impact in a less race-conscious way. Pls.' Opp'n to City's Mem. at 18.

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[14] An "assessment center" is a test or simulation designed to examine how well a candidate fulfills a certain skill set required of the job sought. As Commissioner Evans explained, "there can be assessment centers that will access [sic] how an individual handles paperwork. There can be assessment centers where an individual will be given a scenario in how he would respond in the scenario." Freidel Aff. Ex. 2, at 7 (Deposition of Paul F. Evans, day two).

The Court is not sure that these alternatives would even have been feasible alternatives to the promotion decisions made by the Department. The Department learned of the adverse impact of the 1996 exam only after it received a certified list of passing scores from the Division. Callahan Aff. ¶¶ 8-9, 11. It is doubtful that the Department would have been at liberty, at that late stage, to scrap the 1996 exam altogether and add new components, such as an oral interview, to the process by which it chose new sergeants.

The Court is quite sure, however, that these alternatives would have been much more cumbersome and much less certain to achieve remediation of the adverse impact of the 1996 exam than the promotion decisions that were ultimately made. Edward Callahan testified at a deposition that the reason oral interviews were omitted from the 1996 exam was because "the expense was enormous," and because such interviews did not successfully avert litigation. Callahan Dep. at 119 (dated Sept. 21, 2000). Although similar observations about "assessment centers" are not readily apparent from the record, it is reasonable to assume that such tests -- simulations of real-world sergeant duties -- would be similarly costly, and would not necessarily yield as immediate a reduction in adverse impact as did the promotion decisions at issue in this litigation.

The next consideration in narrow tailoring analysis is the extent to which "the beneficiaries of the [race-based decision] are specially advantaged." *Mackin*, 969 F.2d at 1278. In *Superior Officers*, the First Circuit applied this facet of narrow tailoring:

> Ruiz . . . was not "specially," or unfairly benefitted by his promotion. Ruiz's performance on the 1992 exam was not only passing, but only one point shy of that of the candidates bypassed for his promotion. In *Stuart [v. Roache*, 951 F.2d 446, 449 (1st Cir. 1991), by comparison, we approved the remedial promotion of candidates from below the "certification" cut-off of "2n + 1" candidates, a far greater gap in scores.

147 F.3d at 24. Here, there was no gap between the Black Officers and the Plaintiffs in test score. If the beneficiary of the race-conscious action in *Superior Officers* was found not to have been unfairly rewarded by the promotion decision, then *a fortiori* the Black Officers in this case, who scored identically on the 1996 exam to the Plaintiffs, have not been unfairly benefitted.

Another important factor in the narrow tailoring equation is the degree to which the race-conscious action interferes with the rights, interests, and expectations of third parties. *Paradise*, 480 U.S. at 171; *Mackin*, 969 F.2d at 1278. In this case, the ten officers who also scored 84 but who were not promoted could arguably be said to have had their interests and expectations impaired by the promotion decisions. Several factors, however, mitigate the force of this argument. First, the burden borne here by the Plaintiffs lay in being passed over for promotion, rather than, for example, being laid off. The Supreme Court has recognized that "denial of a future employment opportunity is not as intrusive as loss of an existing job." *Wygant*, 476 U.S. at 282-83. Second, in Massachusetts, civil servants do not have a property interest

in promotions. *Bielawski v. Personnel Adm'r of Div. of Personnel Admin.*, 422 Mass. 459, 466, 663 N.E.2d 821 (1996) (rejecting claim that civil servant had property interest in promotion "by virtue of his name appearing on the top of the certified list, his high score, or his expectations built up over years of long service"). Third, when a civil service exam results in a tie-score, and the appointing authority (in this case, the Department) promotes some but not all of the tied candidates, no actionable "bypass" has taken place in the parlance of the Civil Service Commission. Freidel Aff. Ex. 3, at IV(a) (Civil Serv. Comm'n, *A Guide to the Civil Service Process*) ("A bypass does not occur if one or more candidates have a tie score."); *id.* Exs. 4 & 5 (opinions of the Civil Service Commission dismissing appeals of two of the Plaintiffs in this case, William J. Dwan and William Knecht, respectively, because no bypass had taken place). Fourth, because "white officers passed over on one test may be considered for future appointments," *Stuart v. Roache*, 951 F.2d 446, 454 (1st Cir. 1991), any interference with legitimate interests is likely to be temporary. As the Plaintiffs' counsel represents, the Plaintiffs will continue to seek promotion. Pls.' Opp'n to City's Mem. at 5. Indeed, three of the Plaintiffs, Michael P. Locke, William J. Dwan, and Thomas L. Sexton, have since been promoted to sergeant. Callahan Reply Aff. ¶¶ 3, 5-6 [Docket No. 143]. While the Plaintiffs' interest in being promoted to sergeant was certainly affected by the promotion decisions, the competitive nature of Department promotions, the absence of any legal expectancy in a promotion, and the temporary nature of the imposition suggest that this consideration does not seriously impugn the narrow tailoring of the promotion decisions.

The fourth consideration in narrow tailoring analysis is the degree to which the decision "interferes with other valid state or local policies." *Mackin*, 969 F.2d at 1278. In *Superior Officers*, the court held that the promotion of one Hispanic officer out of rank order did not interfere with state or local policies, because the promotion did not interfere with basic merit principles embodied in the state civil service law. 147 F.3d at 24 ("[Ruiz's] test score indicated that he and Plaintiffs shared virtually identical qualifications."). The court in *Superior Officers* may have given this consideration somewhat short shrift, as the promotion decision at issue in that case, along with the decisions here, certainly are questionable under the state civil service law definition of basic merit principles, which includes a guarantee of "fair treatment of all applicants and employees in all aspects of personnel administration without regard to . . . race." Mass. Gen. Laws ch. 31, § 1.[15]

The structure of the Massachusetts civil service law, however, suggests that the promotion decisions at issue here did not ultimately interfere with valid state policy. First, even though the civil service law guarantees "fair treatment" without regard to race, the Division allows appointing authorities like the Department to make bypasses on the basis of race. The Massachusetts Supreme Judicial Court recognized this in *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 748 N.E.2d 455 (2001), when it observed:

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[15] The Court does not attempt to define precisely what the guarantee of "fair treatment" without regard to race means.

> The police department was not without options for pursuing its goals: Civil service law allows for special certifications based on race, color, national origin or sex. Personnel Administration Rules, PAR 10. . . . The analysis under Par 10 appeals is substantially similar to that of the strict scrutiny standard for protected classes under an equal protection claim.

Id. at 261 n.12 (internal quotation marks omitted). Massachusetts civil service law thus expressly allows for the consideration of race in making bypasses, so long as such a bypass would survive strict scrutiny. But in contrast to the promotions at issue in *Abban* and *Superior Officers*, the promotion decisions here involved no bypass. Freidel Aff. Ex. 3. As such, the Plaintiffs had no basis for appealing the decision of the Department to the Civil Service Commission. Id. Exs. 4 & 5. These two factors suggest that the promotion decisions here did not interfere with valid state policies embedded within the state civil service law.

The final consideration under narrow tailoring is the degree to which the policy or decision is limited in scope and duration. *Paradise*, 480 U.S. at 171; *Mackin*, 969 F.2d at 1278. Here, the decisions involved a one-time promotion of three officers to the rank of sergeant. The City and MAMLEO assert, and the Plaintiffs do not contest, that the 1996 exam has not again been used since the promotions at issue here, Callahan Aff. ¶ 16, that a new exam has replaced the 1996 exam, *id.* ¶ 17, and that all promotions since the ones at issue here have been made in strict rank order, except for bypasses for cause, Evans Aff. ¶ 13. The remedy for the

discriminatory impact of the 1996 exam thus appears to have ended as soon as the promotions were made, or at the latest when the Department abandoned the 1996 exam.

Based on the undisputed facts presented by the parties, the Court concludes that the Department's promotion decisions were narrowly tailored to remedy past discrimination and avoid a Title VII lawsuit.

The Court pauses here for a moment. In determining whether a remedy is limited in duration, courts are often left to rely on the representations of the government that such remedies are limited. In *Superior Officers*, the First Circuit observed that "both the [Department] and the [Division] have represented Ruiz's promotion as a one-time remedy." 147 F.3d at 25. Clearly it was not, otherwise this litigation would never have taken place. The representations made in *Superior Officers* have thus proved unsatisfactory, as this subsequent litigation predicated on the same wrong belies them.

This Court is therefore, unfortunately, left to do what the court in *Superior Officers* did: again warn the Department that this opinion should in no way be taken as carte blanche to engage in race-conscious action in the future. In each subsequent round of litigation, the Department must show not only that it has a strong basis in evidence for its conclusion that current vestiges of past discrimination remain and warrant a remedy, but also that the particular remedy chosen by the Department is narrowly tailored to further such an interest. As the Supreme Court has said:

> Because racial characteristics so seldom provide a relevant basis for disparate

> treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate . . . . Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.

Adarand, 515 U.S. at 236 (citation and internal quotation marks omitted).

One warning should have been enough. In these circumstances, it is altogether fitting and proper to borrow a doctrine from the law of trusts and estates. The City, through its Police Department and Police Commissioner, embraces an essential public trust, vital to the functioning of a modern, heterogeneous, and vibrant urban metropolis -- the effective, even-handed enforcement of the laws to the end that public safety and domestic tranquility may be assured. Indeed, upon the proper discharge of this public trust depend all the other governmental functions of the City. At the same time, in the area of race relations, the Commissioner is between a rock and a hard place. The Commonwealth's civil service law eschews any form of affirmative action, yet the Commissioner believes that, on occasion, such race-conscious action furthers the direct operational needs of the Department. MAMLEO properly is alert to advance the interests of its members yet, if the Commissioner utilizes race as a criterion for hiring and promotion, those who consider themselves "white" are almost sure to sue. Then too, the overarching legal-factual matrix is fluid and evolving.

Where there are similarly difficult issues involving the interpretation of wills and trusts in light of changed circumstances, executors, administrators, and trustees are encouraged to petition the courts for instruction. *See, e.g., Hill v. Moors*, 224 Mass. 163, 165, 112 N.E. 641 (1916); Restatement (Second) of Trusts § 259 (1959); 3A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 259 (4th ed. 1988); 4A *id.* § 394. The entire cy pres doctrine has grown out of such petitions. *See, e.g., Town of Milton v. Attorney Gen.*, 314 Mass. 234, 49 N.E.2d 909 (1943); *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867).

Such a procedure ought work well here, promptly adjudicating the rights of affected parties, subject to review, and providing clear guidance in difficult circumstances to the prime decision makers.

Accordingly, this Court will retain jurisdiction post judgment, and directs the City, whenever the Department seeks to use racial factors in hiring or promotion decisions,[16] to formulate its personnel decision and then petition the Court for instructions concerning whether such a racially motivated

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[16] Nothing herein shall be read to require any such petition concerning the Commissioner's deployment of the Department's resources or in any respect assigning officers to particular duties. The Court appreciates the delicate position the Department is in with regard to these matters, *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring), and does not wish to intervene in the Department's affairs any more than is necessary to ensure the Department's compliance with the Constitution. This procedure is reserved solely for actual hiring or promotional decisions which the Department seeks to make on racial grounds.

decision passes constitutional muster. The Department shall so petition this Court both when it "reaches down" to hire or promote a lower-scoring individual on the basis of race, and when it picks among candidates who are tied on a civil service exam on the basis of race. On its part, the Court will give notice to all affected parties, including MAMLEO, and promptly will hold a hearing, entertain argument, and render a decision. Done properly, such a procedure ought further predictability, hold down the burgeoning legal costs of this sort of litigation, and, most important, further the general societal acceptance of the required nuanced balancing.

V. Conclusion

For the sake of clarity, the Court summarizes the substance of its decision:

1. The Plaintiffs have standing to litigate this case because, as a result of the Department's promotion decisions, they were denied an opportunity to compete on an equal footing with other officers on the basis of race.

2. The Plaintiffs have standing to pursue injunctive relief, as they face a real and immediate threat that their right to compete on an equal footing will be denied again in the future.

3. The Department took account of race in promoting the Black Officers who scored 84 on the 1996 exam, while declining to promote

the Plaintiffs, who also scored 84 and who are white.

4. The Department's promotion decisions are therefore subject to strict scrutiny, which requires that the decisions be supported by a compelling interest and that they be narrowly tailored to further that interest.

5. The Department's stated interest in effectuating its operational needs by maintaining a diverse workforce is not a compelling interest. It is too amorphous and too indefinite in scope and duration, and it risks engendering a politics of racial hostility within the Department and the City.

6. The Department's stated interests in remedying the current vestiges of past discrimination, and in avoiding a Title VII lawsuit, are compelling interests. On this record, the City has satisfied its evidentiary burden of demonstrating a "strong basis in evidence" for its claim that current vestiges of past discrimination remained within the Department, including the adverse impact of the 1996 exam that rendered the Department vulnerable to a meritorious Title VII suit by MAMLEO or minority officers, and warranted a race-conscious remedy.

7. The Department's promotion decisions were narrowly tailored to further these compelling

interests. The promotion decisions did no more than what was necessary to remedy current vestiges of past discrimination and avoid a lawsuit. The record shows no credible alternatives to the promotion decisions that would have been less race-conscious. The promotion decisions elevated three qualified officers to the rank of sergeant at the expense of ten officers, including the Plaintiffs, who, although qualified, had no right or entitlement to be promoted. The promotion decisions were a one-time remedy designed to solve a discrete yet serious harm, and to do so in as narrow a way as possible.

8. The City shall petition this Court for instructions when the Department in the future chooses to use racial factors in hiring and promotions.

For these reasons, the Plaintiffs' motion for summary judgment [Docket No. 124] is DENIED, and the motions of MAMLEO and the City for summary judgment [Docket Nos. 87, 91] are ALLOWED. Judgment shall enter for the Defendants. The Court will retain jurisdiction as noted above.

SO ORDERED.

/s/ _____
WILLIAM G. YOUNG
CHIEF JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-11101 WGY

[January 14, 2002]

WINIFRED N. COTTER, ET ALS.	)
Plaintiffs	)
	)
v.	)
	)
CITY OF BOSTON, ET ALS.	)
Defendants	)
	)

PARTIAL JUDGMENT UNDER THE PROVISIONS OF FEDERAL RULES OF CIVIL PROCEDURE 54 (b) - ORDER

Young, C.J.

Pursuant to Fed. R. Civ. P. 54 (b), this Court hereby enters an order for partial judgment against defendant James J. Hartnett Jr., in his official capacity as the Personnel Administrator for the Commonwealth of Massachusetts, for attorney's fees of $47,180.51, in accordance with the *Stipulation of Facts and Legal Premises and Agreement for Declaratory Judgment*, dated December 21, 2001, between the plaintiffs and James J. Hartnett Jr., in his official capacity

as the Personnel Administrator of the Commonwealth of Massachusetts through his successor and assign, Acting Personnel Administrator Patricia S. Wada ("Personnel Administrator"), filed with this Court on December 31, 2001.

This Court specifically excludes from the entry of this order the entry of any declaratory judgment, as proposed in the *Joint Motion for Entry of and Order for Declaratory Judgment* dated December 21, 2001, since the Court will not enter any declaration until such time as the Court determines that the entry of such a declaration is appropriate.

/s/ _____
WILLIAM G. YOUNG
CHIEF JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-11101-WGY

[October 20, 2002]

WINIFRED N. COTTER, VINCENT J. DIFAZIO, JOHN P. DORIS, WILLIAM J. DWAN, WILLIAM G. KNECHT, MICHAEL LOCKE, PATRICK L. MURPHY, and THOMAS L. SEXTON,
Plaintiffs,

v.

CITY OF BOSTON and JAMES J. HARTNETT, JR.,
Defendant,

MEMORANDUM AND ORDER

YOUNG, C.J.

I. INTRODUCTION

In 1997, eleven City of Boston police officers earned a score of 84 on the civil service sergeant's exam, a certification test administered by the Commonwealth of

Massachusetts Human Resources Division (the "Division"). Eight of these officers were "white" (the "White Officers") and three were "black" (the "Black Officers").[1] When the Boston Police Department (the "Police Department") promoted only the Black Officers, the White Officers brought this action against the City of Boston (the "City") and James J. Hartnett, Jr. ("Hartnett"), in his official capacity as the Personnel Administrator of the Division. The White Officers allege civil rights violations under 42 U.S.C. § 1983, claiming that the City's decision was unlawfully motivated by race and Hartnett's office failed in its duty to prevent such discriminatory actions. Hartnett says, in effect, "Who? Me?" and moves to dismiss the White Officers' claims against him for failure to state a claim upon which relief may be granted because he neither made the promotion selections nor

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[1] Although the parties use the terms "white" and "black" as though their meaning were self-evident, facile adoption of these stereotypes only compounds the issues the Court is asked to address. Racism is a persistent, intractable, and ugly fact of American life, *see e.g. United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998) (Gertner, J.), and it is blind ignorance to declaim that the concept of "race" is nothing more than a social construct. Race matters. Just ask anyone who considers herself black. Still, the Court cannot help but observe that embedded in all governmental efforts to eradicate racism by direct governmental action are a myriad of untested assumptions about "race" that reinforce the coarsest type of racial stereo-typing. It is a conundrum. Perhaps the best that can be said here is that the plaintiff officers consider themselves "whit" and the City of Boston considers the officers initially appointed "black."

allegedly possessed legal authority under Massachusetts law to prevent selection among equally-scoring candidates.[2]

II. MOTION TO DISMISS STANDARD

Taking all facts and inferences drawn therefrom in favor of the White Officers, this Court must grant a motion to dismiss "if it clearly appears, according to the facts alleged, that the plaintiff[s] cannot recover on any viable theory." *Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998). Despite this low threshold, the pleading requirement is "not entirely a toothless tiger." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996). In order to survive a motion to dismiss, the White Officers must set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery. . . ." *Cooperman v. Individual, Inc.*, 171 F.3d 43, 47 (1st Cir. 1999). As such, the Court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like . . . ." *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999).

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[2] The Division itself originally was named as a defendant and also made a motion to dismiss the complaint because, as a state agency, it is not a proper defendant in a federal civil rights lawsuit. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). In their amended complaint, filed after the Division's motion to dismiss, the White Officers have dropped the Division as a defendant and, accordingly, its motion is moot.

III. FACTUAL BACKGROUND DERIVED FROM THE AMENDED COMPLAINT

On October 19, 1996, the Division administered a certification exam for Boston police officers seeking a promotion to the rank of sergeant. *See* Am. Compl. ¶ 18. After scoring the exams, the Division provided the Police Department with a list of the 69 highest scorers arranged in alphabetical order by each score (ranging from 92 down to 82). *See id.*, Ex. A. The group with a score of 84 included both the White Officers and the Black Officers. *See id.* at ¶ 24. The Police Department eventually promoted a total of 36 individuals including the Black Officers. *See id.* at ¶ 38. The White Officers, despite the fact that they had the same score as the Black Officers, did not receive promotions. *See id.*, at ¶ 35.

Correspondence between Police Department officials and Hartnett's office reveal a concerted effort by the Police Department to promote the Black Officers because of their race. Most strikingly, the Police Department initially promoted the Black Officers to the exclusion of six "white" officers who had the higher score of 85.[3] *See id.*, at ¶ 37, Ex. B. In correspondence with the Division, the Police Department stated that this score bypass, referred to in the Amended Complaint as "reaching down," was effectuated "to ensure compliance with current EEOC guidelines, applicable federal and state discrimination laws," *id.*, and to prevent the percentage of "black" sergeants from dropping below 15.18%

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[3] At the time of the examination, there were only 30 open sergeant positions.

of all sergeants,[4] *See id.*, Ex. C. In response, Hartnett's office informed the Police Department by letter that such reasons did not justify a bypass and were unacceptable.[5] *See id.*, Ex. D. To implement its desired promotion of the Black Officers in the face of Hartnett's apparent disapproval, the Police Department requested and obtained a Public Safety Civil Service Requisition for six sergeant vacancies in order to promote, in addition to the Black Officers, the "white" candidates who had been bypassed.[6] *See* Am. Compl. Ex. G. Despite the extensive dialogue between the Police Department and Hartnett's office, however, no mention was ever made of the fact that the Police Department eventually promoted the

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[4] The Amended Complaint does not precisely indicate the importance of keeping minority representation above 15.18%. A fair inference reveals, however, that the statistical figure is related to a 1978 federal court consent decree that required the Police Department to "reach down" to select minority candidates until specific goals and timetables for promotion of black officers were met. The goals were met and the decree came to an end in 1995. *See generally Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 17 (1st Cir. 1998).

[5] The letter stated that the effort to keep the percentage of black sergeants above 15.18% was not acceptable "inasmuch as the consent decree with the Massachusetts Association of Minority Law Enforcement Officers (MAMLEO) is no longer in effect." Am. Compl., Ex. D.

[6] By increasing the total number of "white" officers promoted, of course, the percentage of "black" sergeants actually decreased to 14.4%, lower than the 15.18% figure that the Police Department was trying to avoid by "reaching down" in the first place. *See* Am. Compl. ¶ 45.

Black Officers scoring 84 to the exclusion of the eight White Officers with the same exam score.

IV. ANALYSIS

A. *Hartnett's Specific Obligations Under Civil Service Law*

As the Personnel Administrator of the Human Resources Division, Hartnett is charged with providing eligible lists (based on test scores) of individuals for jobs and promotions in the civil service. *See* Mass. Gen. Laws ch. 31, § 25 (1999). The "ultimate selection" for promotion of civil servants from such lists is left to the "broad" discretion of the appointing authority, in this case the Police Department. *Burns v. Sullivan*, 473 F. Supp. 626, 629 (D. Mass. 1979) (Caffrey, C.J.), *aff'd, 619 F.2d 99 (1st Cir. 1980)*. When, however, the Police Department awards a promotional appointment to an individual "other than the qualified person whose name appears highest" on the list, i.e., a "bypass," the Police Department must "immediately file with [Hartnett] a written statement of . . . reasons for appointing the person whose name was not highest." Mass. Gen. Laws ch. 31, § 27 (1999). Hartnett has the power to accept or reject the reasons given by the Police Department for the bypass. *See MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 635, 666 N.E.2d 1029 (1996); *Boston Police Dep't v. Campbell*, 1997 Mass. Super. LEXIS 285, No. CIV.A. 96-3674-*B, 1997 WL 426973,* at *1 (Mass. Super. 1997) (King, J.). Hartnett relied on this power of rejection when it prevented the Police Department's attempt to promote the Black Officers to the exclusion of "white" candidates with higher test scores.

Unlike statutory or regulatory regimes in other jurisdictions,[7] Massachusetts civil service law does not explicitly spell out Hartnett's responsibilities when an appointing authority makes a promotional selection among candidates with equal scores on an eligibility list.[8] Hartnett contends that, pursuant to Mass. Gen. Laws ch. 31, § 27, his office can "only exercise [] its authority to review an appointing authority's selection of candidates when the authority selects a person with a lower score than another candidate on the list . . ." and "in this case [the Police Department] selected among candidates who had . . . all ranked equally on the eligibility list." Def. Mem. at 11. Despite Hartnett's contention, however, section 27 is *not* triggered by the selection of "a person with a lower score than another candidate." *Id.* (emphasis added). Rather, the statute authorizes Hartnett to review an appointing authority's rationale when it selects somebody "other than the qualified person whose name appears *highest*."[9] Mass. Gen. Laws ch.

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[7] *See, e.g.*, N. J. Stat. Ann. § 40A:14-9.6 (West 1999) ("[A] resident shall be appointed rather than a nonresident thereof in any instance in which the resident and nonresident achieved the same final average score in such test . . . ."); Albuquerque, N.M., Personnel R. and Regs. R. 231 ("When two or more applicants have the same final score, preference shall be given according to seniority, if no other order of preference has been specified.").

[8] In addition to the lack of statutory guidance, the Massachusetts courts have yet to consider whether Hartnett has the ability or responsibility to examine promotional selections among equally-scored candidates.

[9] Hartnett's reliance on the "lower score" language likely stems from the manner in which the Personnel Administration Rules

31, § 27 (emphasis added). This subtle difference illustrates that section 27 presupposes that there will only be one person for an appointing authority to select, i.e., the highest scoring candidate. Any selection among equally-scoring candidates is therefore a "bypass" because all of their names "appear highest." Accordingly, the appointment of less than an entire group of equally-scoring candidates triggers section 27: i.e., it would appear that the appointing authority must immediately file with Hartnett a written statement of reasons for not appointing the entire group (even if there are not enough openings for all of them). *See id.* Such justifications are subject to Hartnett's review. *See MacHenry*, 40 Mass. App. Ct. at 635.[10]

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define a "bypass." *See* Personnel Administration Rules PAR.02 ("Bypass, the selection of a person or persons whose name or names, by reason of score . . . appear lower on a certification than a person or persons . . . whose names appear higher on said certification.") However, "to the extent that there is a conflict between a statute and a regulation, the statute must prevail over the administrative regulation." *Veksler v. Board of Registration in Dentistry*, 429 Mass. 650, 652, 711 N.E.2d 562 (1999), quoting *Pinecrest Village, Inc. v. MacMillan*, 425 Mass. 70, 73, 679 N.E.2d 216 (1997).

[10] It must be remembered that the Court is here ruling on a motion to dismiss Hartnett and takes the White Officers' complaint at face value. The litigants' motion papers do not present, and the Court's independent research has not uncovered, any long-standing tie-breaking administrative procedure of either the Division or the Boston Police Department that comports with the civil service law. Should either defendant come forward with such an administrator procedure, support the description with admissible evidence, and demonstrate that the procedure was followed in this

B. *Hartnett's General Obligations Under Civil Service Law*

Even though the Court is confident that section 27 imposes a specific duty upon Hartnett to intervene whenever there is a selection among equally-scoring candidates, Hartnett's more general obligations under the civil service law reveal an additional duty to act in the case at bar. First, under Massachusetts law, Hartnett is required to "evaluate the qualifications of applicants for civil service positions in accordance with *basic merit principles* and . . . to administer, enforce, and comply with the civil service law and rules. *MacHenry*, 40 Mass. App. Ct. at 635 (emphasis added); *accord* Mass. Gen. Laws ch. 31, § 5(a), (c) (1999). Among other things, the term "basic merit principles" means (i) "advancing . . . employees on the basis of their relative ability, knowledge and skills . . .;" (ii) "assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to . . . race [or] color . . . .;" and (iii) "assuring that all employees are . . . protected from arbitrary and capricious action." Mass. Gen. Laws ch. 31, § 1 (1999). Since the allegations illustrate that Hartnett was aware -- and disapproved -- of the Police Department's intent to promote the Black Officers on the basis of race, his failure to require the Police Department to justify the eventual promotion of the Black Officers to the exclusion of the equally-scoring White Officers does not comport with basic merit principles. Hartnett failed to assure "fair treatment . . . without regard to race" and protect the White Officers from "arbitrary and capricious action."

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case, the Court necessarily will give such administrative procedure appropriate deference.

Second, Hartnett has the authority "to approve or disapprove specifications and qualifications *submitted* by an appointing authority . . . for any civil service position . . . and, in the case of any disapproval, to establish such specifications and qualifications when, in his opinion, the appointing authority has failed to furnish *satisfactory* specifications and qualifications . . . ." *Id.* § 5(c) (emphasis added). Even if section 27 did not require the Police Department to "submit" its reasons for promoting the Black Officers over the equally-scoring White Officers, the Police Department essentially made such submissions in the course of detailing its race-based reasons for promoting the Black Officers over the higher-scoring "white" candidates. Under the basic merit principles, such justifications are hardly "satisfactory" and Hartnett was required to disapprove and establish satisfactory qualifications and specifications.

Third, Hartnett has the authority "to evaluate the qualifications of applicants for civil service positions. "*Id.* § 5(d). This broad grant of discretion, which might not normally require evaluation of a promotional selection among equally-scoring candidates, is triggered when -- as is the case here -- Hartnett knows that race is the primary qualification of a selected applicant. In light of these three general statutory obligations, Hartnett's attempt simply to shrug off his authority to prevent what is alleged to be a known and admittedly race-based appointment policy -- one that is clearly violative of basic merit principles -- is unacceptable.

V. CONCLUSION

At the most, in the absence of any valid tie-breaking administrative procedure, Hartnett is always required to treat

any decision to promote less than an entire group of equally-scoring candidates as a bypass under section 27 and subsequently to reject the use of race as a "reason for appointing the person whose name was not highest." *Id.* § 27. At the least, in the case at bar, Hartnett was required to (i) reject submitted qualifications that are unsatisfactory, even if the submission of such qualifications was not required, and (ii) evaluate promotional selections when he knows that such selections do not comport with basic merit principles. *See id.* § 5(c), (d). In either event, the alleged facts reveal that Hartnett possessed and violated a duty to protect the White Officers from "unfair treatment" and "arbitrary and capricious action." *Id.* § 1. Since section 1983 authorizes liability on the basis of omissions, *see Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994), and Hartnett was authorized to prevent the alleged deprivation of the White Officer's constitutional rights by the Police Department, this Court DENIES Hartnett's motion to dismiss. [Docket No. 14].

/s/ _____
WILLIAM G. YOUNG
CHIEF JUDGE